Supreme Court, U.S.
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No. 95 96

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

PIEDMONT AVIATION, INC.,
Petitioner,

v.

HOBART N. CROCKER, JR.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether backpay from an employer is a legal remedy creating a right to a jury trial under the Seventh Amendment of the United States Constitution, when sought for an implied statuory hiring claim under the Airline Deregulation Act of 1978?

LIST OF PARTIES TO THE PROCEEDING PURSUANT TO RULES 14.1(b) AND 29.1

Pursuant to Supreme Court Rule 14.1(b), Petitioner Piedmont Aviation, Inc. certifies that the names of all parties to this proceeding appear in the caption of this Petition for a Writ of Certiorari.

Pursuant to Supreme Court Rule 29.1, Petitioner Piedmont Aviation, Inc. certifies that: (1) Piedmont Aviation, Inc. was merged into USAir, Inc. effective August 5, 1989, and USAir, Inc. continues as the surviving entity and corporate successor to Piedmont Aviation, Inc. (2) USAir Group, Inc. is the parent of USAir, Inc. and a publicly-traded corporation. (3) Another publicly-traded corporation, British Airways, plc, holds convertible preferred securities of USAir Group, which constitutes 21.9% of the voting interest of USAir Group, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Piedmont Aviation, Inc. ("Piedmont" or "Petitioner")[1] by its undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals in this case.

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[1] Piedmont Aviation, Inc. was merged into USAir, Inc. effective August 5, 1989, and USAir, Inc. continues as the surviving entity and corporate successor to Piedmont Aviation, Inc. The courts below chose to maintain Piedmont Aviation, Inc. as the named party. (App. 2a)

REPORTED DECISIONS

The opinion of the Court of Appeals (App. 1a-29a) is reported at 49 F.3d 735. The opinions of the District Court (App. 33a-40a, App. 43a-52a) are unreported.

Prior proceedings in the case have been reported at: 696 F. Supp. 685, 741 F. Supp. 241, 743 F. Supp. 1, 933 F.2d 1024.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1995. (App. 31a-32a) A petition for rehearing was denied on April 19, 1995. (App. 54a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Court of Appeals had jurisdiction of the appeal pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction under the Airline Deregulation Act, Pub. L. No. 95-504, § 43, 92 Stat. 1750, 49 U.S.C. App. § 1552 (1988), and 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved in this case:

United States Constitution, Seventh Amendment

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Airline Deregulation Act

The duty-to-hire provision of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 43(d)(1), 92 Stat. 1750, 49 U.S.C. App. § 1552(d)(1) (1988), provided:

> Each person who is a protected employee of an air carrier which is subject to regulation by the Civil

> Aeronautics Board who is furloughed or otherwise terminated by such an air carrier (other than for cause) prior to the last day of the 10-year period beginning on October 24, 1978, shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate issued under Section 1371 of this Appendix prior to October 24, 1978. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person.

The provision recently has been recodified at 49 U.S.C. § 42103(a), Public Law 103-272, 108 Stat. 1093, 1159. (App. 2a, n.1) Because the prior decisions in this case have used the original codification, and the statutory modifications do not affect the jury trial issue presented, Petitioner continues to refer to the prior codification at 49 U.S.C. App. § 1552.

STATEMENT OF THE CASE

Although this case arises within the narrow confines of the "duty-to-hire" provision of the Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, § 43, 92 Stat. 1750 (1978), it presents a broad issue of whether a constitutional right to jury trial applies in employment actions for backpay.

Under the duty-to-hire provision of Section 43, air carriers in existence prior to deregulation were placed under an affirmative statutory obligation to hire "protected" airline employees before hiring other persons from outside the airline's workforce. (App. 2a) "Protected" employees were those employed in the airline industry for four years prior to October 1978 who involuntarily lost employment. (*Id.*) However, Congress did not specify an enforcement mechanism for Section 43, nor create any express right to backpay or other remedies

from hiring carriers. As the Court of Appeals correctly noted, "we have no statutory provision whatever creating the cause of action or identifying the available remedies." (App. 26a)[2]

The federal courts have implied a cause of action to enforce the duty-to-hire provisions and applied the normal range of federal court remedies available in employment actions. (App. 35a-36a) *See Long v. Trans World Airlines, Inc.*, 913 F.2d 1262, 1265-67 (7th Cir. 1990); *McDonald v. Piedmont Aviation, Inc.*, 625 F. Supp. 762, 765-66 (S.D.N.Y. 1986); *cf. Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 687 n.9 (1987). In practice, the Courts have administered the ADA duty-to-hire provisions similarly to other federal statutory provisions creating implied employment hiring claims, such as anti-discrimination statutes. *See Robinson v. American Airlines, Inc.*, 722 F. Supp. 757, 763 (D.D.C. 1989), *aff'd*, 908 F.2d 1020 (D.C. Cir. 1990). Because the rights and remedies under Section 43 are totally implied by the courts, the issue of a right to jury trial in ADA duty-to-hire cases is purely an issue of the Seventh Amendment. (App. 38a)

This case was commenced in June, 1986, when Respondent Hobart N. Crocker, Jr. filed a complaint against Petitioner Piedmont Aviation, Inc. for declining to hire him as an airline pilot in alleged violation of the duty-to-hire requirements of the ADA. (App. 3a, 34a)

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[2] In contrast, the statute established a "monthly assistance payment" program, Pub. L. No. 95-504, § 43(b), 92 Stat. 1750-51 (1978), 49 U.S.C. App. § 1552(b)(1), which provided for the payment of unemployment-type benefits *by the government* to protected airline employees who lost their employment as a result of deregulation. *Crocker v. Piedmont Aviation, Inc.*, 933 F.2d 1024, 1025 (D.C. Cir. 1991). Congress' stated intent in adopting the duty-to-hire provisions was to lessen the government's potential liability for unemployment payments by obtaining employment for displaced airline employees. *Id.* at 1026-27. No funds were ever appropriated and no benefits were ever paid by the government under the monthly assistance payment program. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 681 (1987).

Crocker sought an order of instatement in a Piedmont pilot position and any backpay due from the date Piedmont allegedly should have hired him as a pilot under the provisions of the ADA. (*Id.*) Crocker requested a jury trial. (*Id.*)

Piedmont filed a motion to strike Crocker's demand for jury trial. (App. 4a, 34a) On May 4, 1993, the District Court issued a Memorandum Opinion and Order, which relied on this Court's characterization of backpay as an equitable remedy in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992) (App. 39a), and granted Piedmont's motion to strike Crocker's demand for jury trial. (App. 33a-40a, 41a-42a) On May 17 and 18, 1993, the District Court conducted a bench trial, and on July 22, 1993, issued a Memorandum Opinion and Order entering judgment for Piedmont. (App. 43a-52a, 53a)

Crocker pursued an appeal, claiming that his demand for backpay was one for legal monetary damages that entitled him to a jury trial. (App. 4a) The Court of Appeals for the District of Columbia Circuit in a March 3, 1995 opinion granted Crocker's appeal, concluding that (1) generally, backpay from an employer is *not* equitable relief, but legal monetary damages, because it is not "restitutionary," and (2) specifically, under the "duty-to-hire" requirement of Section 43 of the Airline Deregulation Act of 1978, backpay and instatement are not "intertwined" remedies. (App. 1a-29a, 30a, 31a-32a) On those bases, the Court of Appeals held that under the standards of *Teamsters Local No. 391 v. Terry*, 494 U.S. 558 (1990), the Plaintiff had a Seventh Amendment right to jury trial for his backpay claim that had been wrongfully denied by the District Court. (App. 27a, 29a)[3]

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[3] In addition to the Seventh Amendment jury trial issue, the Court of Appeal's decision addressed issues relating to the propriety of a cross-appeal, statute of limitations, and harmless error. (App. 1a-29a) This petition for certiorari is directed solely to the

On March 31, 1995, Piedmont petitioned for reconsideration and filed a suggestion for rehearing in banc. On April 19, 1995, the Court of Appeals denied reconsideration and rehearing in banc. (App. 54a, 55a)

REASONS FOR GRANTING THE PETITION

This case presents the significant issue of the constitutional right to jury trial in implied statutory actions against employers for backpay. The statute under which the case arises, the duty-to-hire provision of Section 43 of the Airline Deregulation Act of 1978, specifies no remedies or enforcement procedures. Consequently, the petition presents a pure issue of Seventh Amendment interpretation concerning the availability of jury trial for backpay claims. The issue is not limited to the Airline Deregulation Act, but has broad implications to other federal employment statutes, including Section 504 of the Rehabilitation Act of 1973, the Veterans Reemployment Rights Act, Section 1983 of the Civil Rights Act of 1871, and Section 1981 of the Civil Rights Act of 1866. If the Seventh Amendment analysis of the D.C. Circuit is adopted by other circuits, it will result in a substantial expansion of jury trials in employment actions in the federal courts.

This Court has consistently characterized backpay—when sought under statutory claims from an employer—as an equitable remedy. In *Terry*, 494 U.S. 558, however, the Court held that backpay sought from a third party, the union, was not equitable or incidental to equitable relief and required a jury trial. The Court of Appeals' decision overreads *Terry* as changing Seventh Amendment precedent and generally requiring jury trials on backpay claims, even against employers. The court erroneously concluded that backpay from an employer is not a form of restitution. The Court of Appeals also

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Court's analysis of the jury trial issue under the Seventh Amendment. (App. 17a-29a)

erred by holding that backpay is not incidental to or intertwined with the equitable remedy of instatement or reinstatement to employment, unless expressly made so under a specific statute's enforcement provisions.

There is a clear division in the courts of appeals in interpreting *Terry* with respect to the equitable nature of backpay. The Eleventh Circuit in *Waldrop v. Southern Co. Servs., Inc.*, 24 F.3d 152, 157-58 (11th Cir. 1994), upon which the D.C. Circuit relied, mischaracterizes *Terry* as a broad rejection of the equitable character of backpay. In contrast, the Sixth Circuit in *Schwartz v. Gregori*, 45 F.3d 1017, 1022-23 (6th Cir. 1995) correctly limits the *Terry* holding to backpay claims against non-employer third parties, and the Fourth Circuit adopts a similar view in *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 832-33 (4th Cir. 1994).

Guidance from the Court concerning the proper interpretation of *Terry* and the right to jury trial on backpay claims is needed and will have broad application beyond this case. The current division in the circuits threatens to waste judicial resources on jury trials in employment cases where the Seventh Amendment mandate does not apply. Finally, review clarifying *Terry* is particularly appropriate because the Court has granted certiorari in another Seventh Amendment jury trial case, *American Airlines, Inc. v. Lockwood*, 115 S. Ct. 2274 (1995), arising in the patent law context, but requiring reference to the Seventh Amendment standards of *Terry*.

I. THE QUESTION PRESENTED IS ONE OF IMPORTANCE TO BACKPAY CLAIMS IN EMPLOYMENT ACTIONS UNDER VARIOUS STATUTES

The fundamental issue presented by this case is whether a claim for backpay from an employer, especially when coupled with a request for instatement or reinstatement as an employee, involves only equitable relief for which there is no right to jury trial under the Seventh Amend-

ment.[4] The Court should grant review because the question of whether a jury trial is available in an employment action for backpay is an important one to the judicial processing of employment claims under many statutes. This case, which arises under the ADA, is a particularly appropriate vehicle for addressing the pure Seventh Amendment issue of the availability of jury trial for backpay claims.

Backpay as a remedy in employment cases consists of the payment by the employer of the wages a plaintiff would have obtained from the employer if the plaintiff had been hired or retained in employment status. *See United States v. Burke*, 504 U.S. 229, 233 (1992). Along with instatement or reinstatement, it is *the* major remedy in employment actions. *See* Barbara L. Schlei & Paul Grossman, *Employment Discrimination Law* 1418 (2d ed. 1994). For this reason, the two principle federal employment statutes—the National Labor Relations Act and Title VII of the Civil Rights Act—expressly make backpay available as a remedy.[5]

Backpay and instatement or reinstatement are intended to "restor[e] victims . . . to the wage and employment positions they would have occupied absent the unlawful

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[4] This case deals with a *hiring* claim seeking backpay and *instatement* against a *prospective* employer. Petitioner believes the jury trial issue it presents applies equally as well to *discharge* actions seeking backpay and *reinstatement* claims against *former* employers. The Court of Appeals' Seventh Amendment analysis makes no distinction between instatement and reinstatement, since both are indisputably equitable remedies. (App. 1a-29a)

[5] The National Labor Relations Act, which is enforced administratively, authorized the National Labor Relations Board "to take such affirmative action including reinstatement of employees with or without back pay . . . ." 29 U.S.C. § 160(c) (1988).

Title VII of the Civil Rights Act has remedial provisions modeled on the NLRA, and provides that a federal court may "order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring of employees, with or without backpay . . . ." 42 U.S.C. § 2000e-5(g)(1) (Supp. V 1993).

[act]." *United States v. Burke*, 504 U.S. at 239. Instatement or reinstatement places a plaintiff in employee status, and backpay coupled with other specific remedies, such as the accrual of pension credit or award of retroactive seniority, restores all employment-related entitlements to a successful plaintiff.[6]

Congress has made jury trials available under certain federal employment statutes, including the Age Discrimination in Employment Act[7] and Title VII of the Civil Rights Act.[8] However, there remain a number of federal

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[6] In this case, for example, Crocker expressly requested as a remedy an award of retroactive seniority and the rank, duties, and compensation of a comparable seniority Piedmont pilot. (App. 34a)

[7] The Age Discrimination in Employment Act expressly provides for jury trials. 29 U.S.C. § 626(c)(2) (1988); *see Lorillard v. Pons*, 434 U.S. 575 (1978).

[8] Prior to 1991, the federal courts consistently held that Title VII provided for equitable remedies, including backpay, and there was no right to jury trial under the statute. *See, e.g., Ramos v. Roche Prods., Inc.*, 936 F.2d 43, 49-50 (1st Cir.), *cert. denied*, 502 U.S. 941 (1991); *Walton v. Eaton Corp.*, 563 F.2d 66, 69 n.1 (3d Cir. 1977); *Cox v. Babcock & Wilcox Co.*, 471 F.2d 13, 14 (4th Cir. 1972); *Landgraf v. U.S.I. Film Prods.*, 968 F.2d 427, 431 (5th Cir. 1992), *aff'd*, 114 S. Ct. 1483 (1994); *Moore v. Sun Oil Co.*, 636 F.2d 154, 156 (6th Cir. 1980); *Harmon v. May Broadcasting Co.*, 583 F.2d 410, 410 (8th Cir. 1978); *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *Snider v. Circle K Corp.*, 923 F.2d 1404, 1407 (10th Cir. 1991); *Lincoln v. Board of Regents*, 697 F.2d 928, 934 (11th Cir.), *cert. denied*, 464 U.S. 826 (1983); *see also Terry*, 494 U.S. at 572 ("[t]he Court has never held that a plaintiff seeking backpay under Title VII has a right to a jury trial.")

The Civil Rights Act of 1991, Pub. L. No. 102-166, Title I, § 102, 105 Stat. 1073, amended Title VII to expressly provide a right to jury trial for claims of intentional discrimination seeking compensatory or punitive damages. 42 U.S.C. § 1981a(c) (Supp. V 1993). However, Congress specifically excluded "backpay" from the definition of "compensatory damages," 42 U.S.C. § 1981a(b)(2) (Supp. V 1993). For this reason, the right to jury trial under

employment statutes where Congress has not expressly directed a jury trial. Among the other implied statutory claims which potentially are implicated by the Court of Appeals' opinion are: Section 504 of the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*,[9] Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983,[10] the Veterans Reemployment Rights Act, 38 U.S.C. § 4301 *et seq.*,[11] and Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981.[12]

The Court of Appeals' conclusion that backpay sought from an employer is *not* restitutionary, and thus not equitable, effectively requires a jury trial in all implied employment actions seeking backpay. The D.C. Circuit's analysis is not limited to duty-to-hire claims under Section 43 of the ADA, but would apply to *any* implied statutory claim for backpay against an employer. The Court of Appeals based its analysis, in part, on the lack of any congressional directive on the jury trial issue under Sec-

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Title VII continues to be inapplicable to claims for backpay. *Townsend v. Indiana Univ.*, 995 F.2d 691, 693-94 (7th Cir. 1993).

[9] *See Waldrop v. Southern Co. Servs., Inc.*, 24 F.3d 152, 159 (11th Cir. 1994) (right to jury trial).

[10] *See Santiago-Negron v. Castro-Davila*, 865 F.2d 431, 441 (1st Cir. 1989) (no right to jury trial when plaintiff only seeking reinstatement and backpay).

[11] *See Troy v. City of Hampton*, 756 F.2d 1000, 1003 (4th Cir.) (en banc), *cert. denied*, 474 U.S. 864 (1985) (no right to jury trial). The Veterans Reemployment Rights Act was renamed and recodified in 1994 as the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq.*

[12] *See Ramos v. Roche Prods., Inc.*, 936 F.2d 43, 50 (1st Cir. 1991) (no jury trial for § 1981 backpay claim); *Moore v. Sun Oil Co.*, 636 F.2d 154, 156 (6th Cir. 1980) (same); *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1142 (8th Cir.) (right to jury trial in § 1981 backpay case), *cert. denied*, 454 U.S. 1064, 1066 (1981) (White, J., dissenting from denial of certiorari); *but see Hornsby v. St. Louis Southwestern Ry. Co.*, 963 F.2d 1130, 1132 (8th Cir. 1992) (backpay a form of equitable relief under 45 U.S.C. § 60).

tion 43 of the ADA. (App. 23a-27a) Thus, in any case where Congress has not specified the availability of jury trial, or expressly characterized backpay as equitable, the D.C. Circuit's analysis would require a jury trial on a backpay claim against an employer, whether or not coupled with a request for instatement or reinstatement.

If the D.C. Circuit's Seventh Amendment analysis is adopted by other circuits, it will likely result in a substantial expansion of the availability of jury trials in employment actions in the federal courts. Jury trials would be required not only in ADA Section 43 cases, but in Section 504 Rehabilitation Act cases, Veterans Reemployment Act cases, Section 1983 and 1981 cases, and cases under other federal statutes where the federal courts have implied employment-related claims. This would aggravate the civil jury trial burden in employment cases that the Civil Rights Act of 1991 has already placed upon the federal courts.

The Court should review this issue at this time in order to avoid the waste of judicial resources on unnecessary jury trials that are not mandated by the Seventh Amendment. The efficient administration of judicial resources is served by the Court accepting this important question of Seventh Amendment analysis.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS CONCERNING THE EQUITABLE NATURE OF BACKPAY

The Court of Appeals' opinion misinterprets *Teamsters Local No. 391 v. Terry*, 494 U.S. 558 (1990) and other Supreme Court decisions that have held consistently that backpay from an employer, especially when coupled with instatement or reinstatement, is a form of equitable relief that does not implicate a constitutional right to jury trial. The Court of Appeals' conclusions, that (1) as a general matter backpay is not "restitutionary," and (2)

backpay and instatement or reinstatement are only "intertwined" when Congress so mandates under a statute's express remedial scheme, are unsupported by *Terry* and other Supreme Court precedent. Further, the recent decisions of other courts of appeals interpreting *Terry* demonstrate a clear conflict and confusion among the circuits concerning the equitable or legal nature of backpay under Seventh Amendment analysis.

A. The Court of Appeals' Misreading of *Terry*

The Court of Appeals recognized that the Supreme Court's decision in *Terry* controls the Seventh Amendment analysis of backpay, and cited the Court's subsequent decision in *Wooddell* for the general standard of jury trial analysis:

> To determine whether a particular action will resolve legal rights, and therefore give rise to a jury trial right, we examine both the nature of the issues involved and the remedy sought. " 'First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.' "

Wooddell v. International Bhd. of Elec. Workers, 502 U.S. 93, 97 (1991) (citations omitted); *see Terry,* 494 U.S. at 565. (App. 17a-18a)

The Court of Appeals engaged in the required historical analysis, which was hindered by the fact that there is no close 18th-century analogue to the Airline Deregulation Act duty-to-hire provisions. While Piedmont believes that under the historical analysis an implied duty-to-hire action is closer in character to equity than to law, the Court of Appeals concluded that the historical analysis was "in equipoise." (App. 21a) *This petition does not challenge that conclusion nor present any issue concerning the historical analysis under the Seventh Amendment.*

Instead, this petition and the Court of Appeals' jury trial analysis focuses on the second test of *Terry* which concludes that monetary damages may be equitable when (1) "they are restitutionary," or (2) "incidental to or intertwined with injunctive relief." *Terry*, 494 U.S. at 570-71. (App. 21a-27a) The Court of Appeals plainly erred in the way it applied these two factors to Crocker's claim of instatement and backpay.

1. *Backpay As Restitution*

The primary error in the decision below is its conclusion that backpay from an employer is, as a general matter, *not* "restitutionary" and thus *not* equitable. (App. 22a-23a) The Court of Appeals appears to base this conclusion, in part, on the fact that the Court in *Terry* "itself found a jury trial right for a purely implied cause of action for back pay." (App. 27a)[13]

But the opinion of the Court in *Terry* shows that the Court concluded that backpay was not restitutionary *because it was sought from a third party, the union, and not the employer.* As a result of a seniority dispute, the plaintiffs in *Terry* initially filed a lawsuit against their employer for allegedly violating their collective bargaining agreement [14] and against their union for allegedly breach-

[13] The Court of Appeals' decision also appears heavily influenced by its prior decision in *Hubbard v. Administrator, EPA*, 982 F.2d 531 (D.C. Cir. 1992) (in banc), in which a divided court found backpay to be non-restitutionary in the context of sovereign immunity analysis under 5 U.S.C. § 702. Judge Edwards wrote a scholarly dissent, 982 F.2d at 544-48, arguing by analogy to the equitable nature of backpay under the Seventh Amendment. Judge Randolph and then-Judge Ruth Bader Ginsburg concurred with the decision, but stated support for Judge Edwards' analysis of backpay as equitable under the Seventh Amendment. 982 F.2d at 539.

[14] Petitioner does not dispute that where backpay is sought from an employer under a breach of contract claim, clearly an action in law under the historical analysis, the Seventh Amendment requires a jury trial. *See, e.g., Vaca v. Sipes*, 386 U.S. 171 (1967);

ing the duty to represent them fairly. 494 U.S. at 526. The company subsequently declared bankruptcy and was dismissed from the case, as was the plaintiffs' request for injunctive relief. *Id.* at 563. The case proceeded *solely* on the duty of fair representation claim against the union and its attendant claim for "compensatory damages for lost wages and health benefits." *Id.*

This Court in *Terry* noted that it had previously "characterized damages as equitable where they are restitutionary, such as in 'actions for disgorgement of improper profits.'" *Id.* at 570 (citations omitted). The Court explained, however, that "[t]he backpay sought by [the plaintiffs was] not money wrongfully held *by the Union,* but wages and benefits they would have received *from* [*the employer*] had the Union processed the employees' grievances properly." *Id.* at 570-71 (emphasis added). And the Court stated that "backpay sought *from an employer* under Title VII would generally be restitutionary in nature . . . in contrast to the damages sought here *from the Union.*" *Id.* at 572 (emphasis added) (citations omitted). Because the relief was sought from the *union,* and not the employer, the "relief is not restitutionary." *Id.* at 571. Indeed, the very point of *Terry,* and the subsequent decision in *Wooddell,* is that backpay claims against unions, as opposed to employers, are not equitable and require jury trials.

This Court's analysis in *Terry* also must be viewed in the context of both prior and subsequent decisions that consistently have characterized backpay, when sought from an employer, as equitable. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992) (discussing nature of damages generally; "both remedies [backpay and prospective relief] are equitable in nature"); *Bowen v. Massachusetts,* 487 U.S. 879, 893 (1988) (describing

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DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983); *Bowen v. United States Postal Serv.,* 459 U.S. 212 (1983).

reinstatement and backpay as an "equitable action for specific relief"); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 & n.10 (1984) (holding that under § 504 of Rehabilitation Act, persons alleging intentional discrimination can bring "equitable action for backpay" and noting the "courts' equitable power to award backpay"); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-96 (1960) (characterizing backpay under FLSA as an equitable remedy); *see also Commissioner v. Schleier*, 115 S. Ct. 2159, 2166 (1995) (citing *United States v. Burke*, 504 U.S. 229, 238-40 (1992)) ("we emphasized in *Burke* the lack of a right to a jury trial and the absence of any provision for punitive damages as factors distinguishing the pre-1991 Title VII action from traditional tort litigation"); *Curtis v. Loether*, 415 U.S. 189, 197 (1974) ("[i]n Title VII cases the courts of appeals have characterized backpay as an integral part of an equitable remedy, a form of restitution").[15]

Thus, *Terry* represents an exception to this Court's consistent treatment of backpay as equitable relief. *Terry* simply stands for the proposition that backpay can be a legal remedy creating a right to jury trial when it is sought from a third party such as a union rather than a hiring or discharging employer. Indeed, the term "backpay" in the *Terry* context is something of a misnomer, because the union would never have an employment relationship with the plaintiff employees.[16]

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[15] Congress has consistently characterized backpay as an equitable remedy under Title VII, thereby excluding jury trials. 42 U.S.C. § 2000e-5(g)(1). When enacting the Civil Rights Act of 1991, Congress carefully excluded backpay from the definition of compensatory damages, continuing to deny jury trials for backpay claims. 42 U.S.C. § 1981a(b)(2); *Townsend v. Indiana Univ.*, 995 F.2d 691 (7th Cir. 1993). Congress' treatment of backpay as equitable under Title VII is not a statute-specific exception. Instead, it represents a general legislative interpretation of the equitable nature of backpay under the Seventh Amendment, which should continue to be given weight by this Court.

[16] In such circumstances, the term "lost wages" is perhaps a more appropriate description of the remedy. 494 U.S. at 563.

2. *"Incidental To Or Intertwined With" Equitable Relief*

The other error in the Court of Appeals' analysis is its treatment of the second criterion of *Terry*—whether backpay is "incidental to or intertwined with" equitable relief.[17] The Court of Appeals concluded that instatement or reinstatement and backpay are "intertwined" *only* when Congress makes them so in express remedial provisions of a statute. (App. 24a-26a) But the court seemed rather uncomfortable with this analysis, noting that "[i]t may seem counterintuitive to determine the availability of a *constitutional* guarantee on the basis of such subtle intimations from *Congress*." (App. 26a) (emphasis in original)

The opinion of the Court of Appeals appears to be the only lower court decision that attempts a full examination of the "incidental or intertwined" criterion of *Terry*, and its decision evidences confusion on the issue.[18] Piedmont suggests that the "incidental or intertwined" criterion relates not merely to the specific legislative scheme but to the actual administration of the remedy. And, in administration, backpay and instatement or reinstatement are always intertwined. For example, when coupled with a claim of instatement, the amount of backpay due cannot be determined at the time of a complaint and specified in an *ad damnum* clause (a traditional characteristic of legal claims), because it is indeterminate unless and until the court rules on the availability and timing of instatement.

This Court has held consistently in employment actions that a request for backpay and instatement or reinstatement are "intertwined" and equitable in character. *See Wooddell v. IBEW*, 502 U.S. at 97 (explaining that under facts in *Terry*, "an award of money damages" was not equitable in the Seventh Amendment context, because

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[17] As the court noted, there is no dispute that instatement is a form of equitable relief. (App. 17a)

[18] *See also Hornsby v. St. Louis Southwestern Ry. Co.*, 963 F.2d 1130, 1134-35 (8th Cir. 1992) (Arnold, J. dissenting).

it was not "incidental to or intertwined with injunctive relief"); *Tull v. United States,* 481 U.S. 412, 424 (1987) (court in equity empowered to provide "monetary" awards "incidental to or intertwined with injunctive relief"); *Mitchell v. Robert DeMario Jewelry, Inc.,* 361 U.S. at 291-96 (under FLSA, backpay incident to court's injunctive power is restitutionary, and thus equitable).

In *Terry,* where the reinstatement claim against the employer had been dropped from the case, there was no "intertwining" to support a claim for equitable relief. But in most hiring claims, such as Crocker's, where both instatement or reinstatement and backpay are sought, the claims are "intertwined" and negate any Seventh Amendment right to a jury trial under *Terry.*

Thus, the Court of Appeals fundamentally misread *Terry* on both the "restitutionary" and the "incidental or intertwined" criteria. The *Terry* decision, in fact, reinforces this Court's long-held view that backpay sought from an employer is restitutionary, and that a backpay claim coupled with a request for instatement or reinstatement is equitable. Nothing in *Terry,* or any other Supreme Court decision, supports the Court of Appeals' conclusion that the Seventh Amendment requires a jury trial for a claim for instatement and backpay from an employer under a federal statute, such as Section 43 of the ADA, that creates implied hiring claims.

B. The Conflict In The Circuits

As the D.C. Circuit's language evidences, the court clearly overread the *Terry* decision as characterizing backpay as a legal remedy, even when sought from an employer: "[W]e note that *Terry* itself found a jury right for a purely implied cause of action for back pay." (App. 27a) Unfortunately, the D.C. Circuit is not alone in that error.[19]

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[19] As noted above, even in the D.C. Circuit there is support for the proposition that employment claims for backpay are equitable and do not create a right to jury trial under the Seventh Amend-

The Eleventh Circuit has similarly misread *Terry*, in *Waldrop v. Southern Co. Servs., Inc.*, 24 F.3d 152 (11th Cir. 1994), a case the D.C. Circuit relied upon in its decision below. (App. 23a) In *Waldrop*, an employment action arising under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Eleventh Circuit found a jury trial right for a backpay claim against a former employer. Noting that "the recent trend of Supreme Court cases is to treat back pay awards as legal remedies" and "in *Terry* . . . a back pay award was a legal remedy," the Court simplistically concluded "it would be careless to hold . . . that backpay awards under Section 504 constitute equitable restitution . . . ." 24 F.3d at 157-58. Thus, the Eleventh Circuit, like the D.C. Circuit, seems to have erroneously generalized from *Terry* to conclude that backpay is always a legal remedy.

But at least one circuit, the Sixth, has correctly analyzed the holding of *Terry* as limited to backpay claims against non-employer, third parties. In *Schwartz v. Gregori*, 45 F.3d 1017 (6th Cir. 1995), the Court analyzed the legal and equitable nature of backpay for purposes of determining available remedies under Section 502(a)(3) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a). Reviewing the facts and analysis of *Terry*, the Sixth Circuit concluded that the equitable versus legal nature of backpay depends upon the party against whom the remedy is sought.

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ment. As Judge Edwards stated in his dissent in *Hubbard v. Administrator, EPA*, 982 F.2d 531 (D.C. Cir. 1992) (en banc):

> Courts have recognized the equitable nature of back pay awards in a number of different contexts. Generally, these decisions hold that back pay constitutes the very thing that the plaintiff would have received *but for* the defendant's illegal action; back pay is thus seen to reflect equitable restitution. Some decisions also justify a back pay award as incidental to an equitable instatement order. On either rationale, there is strong authority . . . .

Id. at 544.

> Significantly, *Terry* characterized the back pay at issue in *Mitchell* as *restitutionary*, and stated as well that relief incidental or intertwined with injunctive relief may be considered to be equitable.
>
> Like in *Mitchell*, the back pay at issue in this case was awarded against the employer rather than a third party, and thus operates to restore to the plaintiff that to which she would have enjoyed but for the employer's illegal retaliation. While restitution generally is awarded to prevent unjust enrichment to the defendant, this is not required in every case. . . . While *Terry* did not expound on its reasons for characterizing as restitutionary the award of back pay against an employer . . . these principles fully support its conclusion.

Schwartz, 45 F.3d at 1022 (emphasis in original) (citations omitted). Thus, the Sixth Circuit has recognized that the characterization of backpay as legal in *Terry* was based on the fact that it was sought from a third party, and not an employer.[20]

The Fourth Circuit appears to have recognized the same principle.[21] In *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823 (4th Cir. 1994), the Court analyzed the jury trial issue under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The Fourth Circuit concluded:

> While it may be that backpay received from an *employer* could be characterized as restitutionary and thus equitable, such as in a standard Section 504 or Title VII action (an issue not before us), in this instance Pandazides is suing a *third party*, the certifying board.

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[20] A petition for certiorari has been filed in *Schwartz v. Gregori*, 63 U.S.L.W. 3892 (June 12, 1995) (No. 94-2035) raising ERISA interpretation issues.

[21] The Fourth Circuit adopted a similar analysis of backpay claims under the Veterans Reemployment Rights Act in a pre-*Terry* case, *Troy v. City of Hampton*, 756 F.2d 1000 (4th Cir.) (en banc), *cert. denied*, 474 U.S. 864 (1985).

Pandazides, 13 F.3d at 832 (emphasis in original). Thus, the Fourth Circuit articulated the distinction between employers and third parties which underscores the *Terry* analysis.[22]

More briefly, the Fifth Circuit in *Wilson v. Belmont Homes, Inc.*, 970 F.2d 53, 56 (5th Cir. 1992) has commented in a Title VII case that post-*Terry* backpay from an employer "obviously would be restitutionary."

To Petitioner's knowledge, no other Court of Appeals has opined on the interpretation of *Terry* with respect to backpay claims. Recently, the Tenth Circuit was presented with the same issue as this case: the right to jury trial in backpay actions under Section 43 of the ADA. *See Bowdry v. United Airlines, Inc.*, 1995 U.S. App LEXIS 16021 (10th Cir. June 28, 1995). However, because the issue was not perfected procedurally, the Tenth Circuit declined to address it. *Id.* at *17.

Nonetheless, there is a clear division between the position of the D.C. Circuit and the Eleventh Circuit, and that of the Sixth Circuit and the Fourth Circuit (and possibly the Fifth Circuit), in interpretation and application of *Terry* to backpay claims. The treatment of backpay for jury trial purposes is an important issue among the courts of appeals, and is continuing to arise under a variety of statutes, including Section 43 of the ADA, Section 504 of the Rehabilitation Act, the Veterans Reemployment Rights Act, and Sections 1981 and 1983.

III. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE APPLICATION OF *TERRY* TO BACKPAY CLAIMS AGAINST EMPLOYERS

The potential impact of the D.C. Circuit's interpretation of *Terry* to backpay claims against employers and

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[22] The Ninth Circuit has similarly recognized in a Section 504 case that, under *Terry*, backpay may be equitable when intertwined with equitable relief. *Smith v. Barton*, 914 F.2d 1330, 1337 (9th Cir. 1990), *cert. denied*, 501 U.S. 1217 (1991).

the existing conflict in the circuits concerning the interpretation of *Terry* provide ample basis for the Court to grant certiorari. As Justice White once wrote: "[T]he right to a jury trial is fundamental. It is not a tolerable rule of law that one's right to a jury trial depends upon the geographical location of the federal district court within which one files a complaint." *Novack Investment Co. v. Setser*, 454 U.S. 1064, 1065 (1981) (White, J., dissenting from a denial of certiorari). In addition, the pendency of another Seventh Amendment case before the Court supports review.

For the first time since the 1991 *Wooddell* case, the Court has granted certiorari in a Seventh Amendment jury trial case. In *American Airlines, Inc. v. Lockwood*, the Court will review the availability of jury trial under the Seventh Amendment in certain patent actions. 115 S. Ct. 2274 (1995).

Petitioner respectfully suggests that the Court should review this case concurrent with *American Airlines*. Review in *American Airlines* will require the Court to examine its established Seventh Amendment analysis under *Terry* and *Wooddell* in the specialized context of patent litigation. Yet, a conflict exists in the circuits in interpreting *Terry* in its own context of backpay claims in employment-related actions. Because the *American Airlines* case will not resolve the specific issue of the equitable nature of backpay from an employer under Seventh Amendment analysis, holding this case pending a decision in *American Airlines* will not be sufficient to clarify the issue presented by this petition. Therefore, it is appropriate for the Court to grant certiorari in this case to clarify the direct application of *Terry* in employment cases concurrent with addressing related Seventh Amendment issues involving patent claims in the *American Airlines* case.

Granting certiorari in this case will give the Court the opportunity to clarify *Terry* concerning backpay claims

against employers. Review will ensure that the courts of appeals do not misinterpret *Terry* and vastly expand the availability of jury trials in employment actions where plaintiffs seek backpay from employers.

CONCLUSION

For the reasons set forth above, this Court should grant the writ of certiorari to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Dated: July 18, 1995

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 31, 1994 Decided March 3, 1995

No. 93-7141

HOBART N. CROCKER, JR.,
Appellant

v.

PIEDMONT AVIATION, INC.,
Appellee

No. 93-7142

HOBART N. CROCKER, JR.,
Appellee

v.

PIEDMONT AVIATION, INC.,
Appellant

Appeals from the United States District Court
for the District of Columbia
(86cv01673)

Before: WILLIAMS, GINSBURG and ROGERS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

WILLIAMS, *Circuit Judge*. When Congress deregulated the airline industry in the late 1970s, it sought to soften the blow to longtime airline employees who might lose their jobs in the expected industry shake-up. It therefore included in the deregulatory legislation an Employee Protection Program ("EPP") for experienced airline workers who lost jobs or income as the result of a covered carrier's bankruptcy or downsizing. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 43, 92 Stat. 1750 (1978) (current version at 49 U.S.C. §§ 42101-06). Among other things, the EPP gives a furloughed or terminated employee with four years' experience as of October 1978 a "first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees. . . ." Airline Deregulation Act § 43(d)(1); see also recodification at 49 U.S.C.A. § 42103 and hist. note (West 1994).[1] Airlines are under a corresponding "duty to hire such a person before they hire any other person" besides their own laid-off employees. Airline Deregulation Act § 43(d)(1).

Hobart Crocker, Jr., a furloughed pilot protected by the EPP, sued Piedmont Aviation (now part of USAir, Inc.) for allegedly failing to hire him in violation of the Act. His complaint asked for instatement as a pilot and back pay. The district court denied Crocker's motion for a jury trial and, in a bench trial, found for Piedmont. We now hold that Crocker was entitled to a jury trial on his claims and that his failure to receive such a trial was prejudicial. In response to Piedmont's cross-appeal, we hold that the district court ruled correctly in finding Crocker's complaint to be timely filed under the District of Colum-

[1] The 1994 recodification has changed this language somewhat, with no effect on substance. The provision now states that a "protected employee . . . is entitled to be the first employed in the occupational specialty of the employee, regardless of the employee's age, by any other air carrier" covered by the Act. The language specifying the airline's corresponding duty to hire was deleted as surplusage. 49 U.S.C.A. § 42103 and hist. note (West 1994).

bia's general three-year tort statute of limitations. We therefore remand the case for a jury trial.

I.

Crocker was a pilot for Air New England from 1973 until he was furloughed when the carrier ceased operations in October 1981. In April 1982 he applied for a position as a pilot with Piedmont Aviation. Piedmont called Crocker and invited him to interview with the airline's pilot selection committee in July 1982. Crocker was then 56 years old.

At this point, Piedmont's and Crocker's stories diverge. Piedmont maintains that immediately after the meeting, it disqualified Crocker from further consideration based on his admission during the interview that the Federal Aviation Administration had temporarily suspended his pilot's license for violating safety rules. Crocker, on the other hand, alleges that Piedmont refused to hire him because of his age, notwithstanding the EPP's explicit prohibition on taking age into account.

In March 1984, Piedmont began hiring pilots who were not covered by the EPP's first-hire obligations. Crocker filed this action in June 1986, alleging that the hiring of these unprotected candidates violated his priority under the EPP; he asked for instatement as a pilot and back pay and demanded a jury trial. Piedmont moved for summary judgment in 1988 on the grounds that the suit was untimely filed; as discussed in greater detail below, the district court denied the motion. 696 F. Supp. 685, 689-92 (D.D.C. 1988). Piedmont filed a second motion for summary judgment (technically, a motion to strike part of the plaintiff's claim for relief) in 1989, contending that Crocker lost his EPP rights when he took temporary employment with a non-certificated, bankrupt air taxi service while awaiting a decision from Piedmont. The district court granted the motion. 741 F. Supp. 241 (D.D.C. 1989). Crocker appealed, and we reversed and remanded

for trial. *Crocker v. Piedmont Aviation, Inc.*, 933 F.2d 1024 (D.C. Cir. 1991).

Roughly a week before jury selection was to begin, the district court granted Piedmont's motion to strike Crocker's jury demand on the grounds that the claims for back pay and instatement were both equitable in nature; hence, the Seventh Amendment's guarantee of a jury trial for all "Suits at common law, where the value in controversy shall exceed twenty dollars" did not apply. After a two-day bench trial, the court found that Piedmont had a policy of never hiring pilots whose flying licenses had been suspended by the FAA, that this hiring standard was a legitimate non-age-based requirement of employment, and that Piedmont had refused to hire Crocker because he failed to meet this standard. The court entered judgment for Piedmont.

Crocker now appeals both the order striking his jury demand and the order entering judgment for Piedmont. Piedmont cross-appeals the district court's 1988 decision applying a three-year statute of limitations to the claims and denying summary judgment. We address the statute of limitations issues first.

II.

A. *Waiver and Law of the Case*

Piedmont urges us to affirm the judgment entered in its favor, regardless of how we rule on the Seventh Amendment question, because the suit was filed out of time. The airline maintains that a six-month statute of limitations borrowed from the National Labor Relations Act governs the cause of action and bars this suit, which was filed 27 months after the claim accrued in March 1984. Piedmont initially raised this argument before the tiral court in its 1988 motion for summary judgment. The district court denied this motion, holding that the District of Columbia's general three-year tort statute of limitations provided the relevant period and that Crocker's suit was thus timely

filed. When this case came to us on Crocker's appeal in 1991, however, Piedmont did not challenge this earlier statute of limitations ruling or present it as a possible alternative basis for affirming its award of summary judgment.

Crocker maintains that by this failure to present the issue to us in 1991, Piedmont has forfeited the possibility of raising a statute of limitations argument on this appeal. He argues that the district court's 1988 limitations ruling has become the binding law of the case, which we may not revisit. We reject Crocker's position and decide the limitations issue.

"Law-of-the-case doctrine" refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as the law of the case) by that court or a higher one in earlier phases. When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court. See, e.g., *Northwestern Ind. Tel. Co. v. FCC*, 872 F.2d 465, 471 (D.C. Cir. 1989) (appellate court's prior ruling establishing exhaustion requirement is law of the case and cannot be challenged on second appeal); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1090, 1093 (D.C. Cir. 1984) (challenge to district court's correct application of prior appellate decision is barred by law-of-the-case doctrine); see also 18 R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478, at 801 (1981); *id.* at 625 (1994 Supp.) ("Arguments that were not advanced on appeal may be lost because they are found wrapped up with a larger issue that was decided" previously). What identifies this as true law-of-the-case preclusion is that the first appeals court has affirmatively decided the issue, be it explicitly or by necessary implication. See *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 n.14 (D.C. Cir.

1990) ("Questions that merely could have been decided do not become law of the case") (citing *Bouchet v. National Urban League*, 730 F.2d 799, 806 (D.C. Cir. 1984)).

Previous decisions of this court have extended these principles beyond their core application. We have several times said that appellate courts are precluded from revisiting not just prior *appellate* decisions but also those prior rulings of the *trial* court that could have been but were not challenged on an earlier appeal. "[A] legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, [governs] future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time," *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987). See also *Palmer v. Kelly*, 17 F.3d 1490, 1495-96 (D.C. Cir. 1994); *Laffey*, 740 F.2d at 1089-90 (defendant's failure to challenge district court's formula for calculation of damages on first appeal waives any potential challenge on later appeals). Although we have often referred to this second principle as a type of law-of-the-case rule (in part because the two principles were first articulated in this circuit alongside one another, see *Laffey*, 740 F.2d at 1089-93), it is an analytically distinct principle: unlike law-of-the-case doctrine proper, this bar on raising issues omitted from prior appeals—best understood as a species of waiver doctrine—does *not* involve any previous appellate court decision on the barred issue. Our occasional shorthand suggestion that the trial court's decision becomes "law of the case" for the appellate court is technically inaccurate. Cf. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817-18 (1988) ("[A] district court's adherence to law of the case cannot insulate an issue from appellate review").

In any event, neither law-of-the-case doctrine proper nor this subsidiary waiver principle is an absolute pre-

clusion to appellate review. Law of the case is a prudential rule rather than a jurisdictional one; in the words of Justice Holmes, the doctrine "merely evpresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power," *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). See also *Christianson*, 486 U.S. at 817; *Arizona v. California*, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion[;] it does not limit the tribunal's power."); *Women's Equity Action League*, 906 F.2d at 751-52 n.14. The derivative waiver rule is justified by a similar practical concern for judicial economy, as it channels into the first appeal issues whose early resolution might obviate the need for later rounds of remands and appeals. See *Laffey*, 740 F.2d at 1089 (waiver rule flows from need for "orderly conduct of litigation"). But the concerns for judicial economy underlying this waiver rule are plainly weaker than for core law-of-the-case doctrine; the waiver rule is never needed to prevent the appellate court from revisiting matters it has already decided once.

For both core law-of-the-case preclusion and its diluted waiver variant, the bases for exceptions are broader than for conventional issue or claim preclusion. While final judgments normally may not be re-examined merely because of an intervening change in the law, see, e.g., 18 Wright, Miller & Cooper § 4415, at 130-31; see also *id.*, § 4426 at 268 (suggesting that similar principles govern issue preclusion), such a change *will* support a departure from the previously established law of the case. See *Women's Equity Action League*, 906 F.2d at 752 n.14 ("When intervening legal authority makes clear that a prior decision bears qualification, that decision must yield. Law of the case cannot be substituted for the law of the land.") (internal quotation marks omitted). Similarly, an appellate court may deviate from the law of the case if the previous decision was "*clearly* erroneous and would work a *manifest* injustice," *Arizona v. California*, 460 U.S. at 618 n.8 (emphasis added), which would not

justify overturning a final judgment. The preclusive barrier of the waiver doctrine is even one notich weaker: the appellate court, for example, always possesses discretion to reach an otherwise waived issue logically "antecedent to and ultimately dispositive of the dispute before it," *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 113 S. Ct. 2173, 2178 (1993) (ellipses and internal quotation marks omitted), although discretion to waive a waiver is normally exercised only in "exceptional circumstances, where injustice might otherwise result," *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 717 (D.C. Cir. 1986).

The present case involves an application of waiver doctrine, not core law-of-the-case principles. It is true, as Crocker notes, that had Piedmont presented its statute of limitations argument to us in 1991 when we reviewed the earlier grant of summary judgment, three years of additional litigation could potentially have been avoided: a finding that Crocker's suit was time-barred would have obviated the need for any kind of trial, whether by court or jury. But Piedmont's role as an appellee introduces other concerns. Crocker, not Piedmont, defined the battleground on the first appeal, raising issues having nothing whatever to do with the statute of limitations. While there are clear adjudicative efficiencies created by requiring appellants to bring all of their objections to a judgment in a single appeal rather than *seriatim* (the *only* context in which we have ever before now applied the waiver doctrine), forcing appellees to put forth every conceivable alternative ground for affirmance might increase the complexity and scope of appeals more than it would streamline the progress of the litigation. While an appellant must persuade the court to overturn a district court ruling, it enjoys the offsetting procedural benefit of filing both the opening and reply briefs. On the other hand, an appellee presenting alternative grounds for affirmance and facing a potential application

of the waiver doctrine must also attack an adverse district court ruling,[2] but without the offsetting advantage of being able to file a reply brief.

Of course, an appellee might respond to this procedural handicap by filing a cross-appeal, as Piedmont did on this round of appeals. But this imposes significant burdens on the appellate court. Cross-appeals are required only when the party prevailing below seeks to enlarge the scope of that judgement; they are not necessary when the party simply presents alternative bases for affirmance. See *United States v. American Ry. Express*, 265 U.S. 425, 435 (1924); *Koniag, Inc. v. Andrus*, 580 F.2d 601, 605 n.3 (D.C. Cir. 1978). These unnecessary cross-appeals may alleviate the procedural asymmetry faced by the appellee, but they generate additional complexity that has elicited sharp judicial rebuke:

> Cross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary. They disrupt the briefing schedule, increasing from three to four the number of briefs, and they make the case less readily understandable to the judges. The arguments will be distributed over more papers, which also tend to be longer. Unless a party requests the alteration of the judgment in its favor, it should not file a notice of appeal.

Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 439 (7th Cir. 1987). See also 15A Wright, Miller & Cooper § 3904, at 205 ("Cross-appeal procedure complicates briefing schedules and the number and lengths of briefs in ways that may generate more confusion than enlightenment").

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[2] The waiver rule we have been discussing applies only when the trial court has expressly or impliedly ruled on a question and there has been an opportunity to challenge that ruling on a prior appeal. See *Williamsburg Wax Museum*, 810 F.2d at 250. If the trial court has not affirmatively ruled, the waiver doctrine would be inapplicable.

Thus, full application of the waiver rule to an appellee puts it in a dilemma between procedural disadvantage and improper use of the cross-appeal. That dilemma, together with the potential judicial *dis*economies of forcing appellees to multiply the number of arguments presented, justifies a degree of leniency in applying the waiver rule to issues that could have been raised by appellees on previous appeals.

Finally, any doubts that we might have here about the propriety of reaching the limitations issues are allayed by the fact that deciding Piedmont's proffered narrow question of statutory interpretation offers us the potential (at least when viewed *ex ante*) of resolving the case without making pronouncements on the complex Seventh Amendment questions. Cf. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (counseling against reaching constitutional questions when potentially adequate nonconstitutional grounds for decision exist); *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 810 (D.C. Cir. 1993) (same). We therefore turn to the merits of Piedmont's arguments.

B. *Statute of Limitations*

The EPP does not explicitly create a private cause of action for protected employees whose first-hire rights have been violated; rather, courts have inferred such a right of action from the structure of the statutory scheme and the policies it is designed to further. See generally *Long v. Trans World Airlines, Inc.*, 913 F.2d 1262, 1265-67 (7th Cir. 1990). Obviously, Congress did not specify a statute of limitations to govern a cause of action it did not consciously create. As a result, we must "discern[] the limitations period that Congress intended courts to apply to a cause of action it really never knew existed." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2780 (1991).

The district court held that the most appropriate statute of limitations to borrow was the District of Columbia's general three-year period applicable to tort claims not otherwise specified, *D.C. Code* § 12-301(8); hence, the suit—filed 27 months after the cause of action accrued—was saved. Piedmont, on the other hand, argues that the most analogous statutes of limitation are federal: the six-month period for filing unfair labor practice complaints under the National Labor Relations Act, 29 U.S.C. § 160(b), or the maximum 300-day limitations period for filing a complaint with the Equal Employment Opportunity Commission under the Age Discrimination in Employment Act, 29 U.S.C. § 626(d)(2). Should we find no federal statute of limitations appropriate, Piedmont contends, the one-year time limit for bringing an age-discrimination suit under the District of Columbia's Human Rights Act, *D.C. Code* § 1-2544, should govern. Under any of Piedmont's theories, Crocker's suit would be time-barred.

Federal courts usually look to state law for an analogous statute of limitations. This represents long-standing judicial practice under the Rules of Decision Act and a presumed congressional endorsement of that practice. See *Lampf, Pleva,* 111 S. Ct. at 2778 (plurality opinion); *Reed v. United Transp. Union,* 488 U.S. 319, 323-24 (1989); *Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. 143, 147 (1987). On the other hand, the importation of state law in some instances would interfere with federal policy, and it would be "inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law," *DelCostello v. International Bhd. of Teamsters,* 462 U.S. 151, 161 (1983). In those cases, we look for a statute of limitations in federal law. See *DelCostello; Agency Holding Corp.* Still, our borrowing from federal law is "unusual" and "a closely circumscribed exception to the general rule," *Reed,* 488 U.S. at 324; we will do it

"only 'when a rule from elsewhere in federal law *clearly* provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a *significantly* more appropriate vehicle for interstitial lawmaking,' " *id.* (quoting *DelCostello*, 462 U.S. at 172) (emphasis added).

We must therefore find two things before we look to federal law for a limitations period: a federal policy that would clearly be frustrated by using state statutes of limitation, and a closely analogous federal statute. As to the first, Piedmont posits a strong federal interest in interjurisdictional uniformity in the administration of the EPP, given that the airline industry is overwhelmingly interstate. It is true that in *Agency Holding Corp.* the Court observed that a single civil RICO suit could potentially encompass an enormous range of state-law claims in multiple jurisdictions simultaneously and accordingly found a single, uniform federal limitations period for these suits. See 483 U.S. at 153-54. On the other hand, the mere possibility that an actor with operations in more than one state might be subject to different statutes of limitation for the same conduct in different jurisdictions cannot itself be enough to force a uniform period: such is the result *any* time a federal court borrows a local statute of limitations, yet the norm is to look to state law. See *Wilson v. Garcia*, 471 U.S. 261, 275 (1985) (requiring that all kinds of § 1983 actions be classified as personal injury suits for purposes of seeking analogous state causes of action, but recognizing that use of state analogy will cause interstate variation).

The EPP lawsuits at issue here fall midway along this spectrum. On the one hand, although there is some potential factual variation among first-hire claims (as we discuss below), it is not so great as for the hydra-headed civil RICO actions considered above. On the other hand, given that all (or at least virtually all) of the regulated airlines subject to the EPP would have operations in more

than one state, the statute by its terms assures that a high proportion of cases and defendants will be subject to diverse limitations periods. As the Court appeared to regard civil RICO as a truly exceptional case, we think this intermediate position cannot automatically justify insistence on a uniform federal period; we regard it only as a factor to be kept in mind as we search for federal statutory analogs.

Neither of the federal statutes put forth by Piedmont—the National Labor Relations Act and the Age Discrimination in Employment Act—is sufficiently similar to the EPP to turn us away from the usual practice of borrowing from state law. The Supreme Court has regarded the NLRA's uniform six-month limitations period for filing unfair labor practice charges with the National Labor Relations Board as especially necessary to support "those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it," *DelCostello*, 462 U.S. at 163 (citation omitted). See also *Reed*, 488 U.S. at 333 (stressing that purpose of six-months limit is to sustain special "federal interests in stable bargaining relationships and in private dispute resolution"). Thus the Court has extended the NLRA's six-month period to hybrid suits combining Labor Management Relations Act § 301 claims against an employer for breach of a collective bargaining agreement with NLRA claims against a union for breach of its duty of fair representation in the agreement-created grievance process. *DelCostello*. But the Court has not applied this period to all labor-law actions: it refused to apply it to a suit to enforce union democracy rights created by § 101 of the Labor-Management Reporting and Disclosure Act even though the resolution of the suit could have had "some impact on economic relations between union and employer and on labor peace". *Reed*, 488 U.S. at 331.

The EPP's connection to NLRA unfair labor practice adjudication is quite remote. The EPP provides special hiring rights regardless of whether the protected worker's past or potential employers are covered by any collective bargaining agreement or other federally promoted relationship. Any effect that a successful EPP suit might have on a collective bargaining agreement is indirect and contingent: should a court order the instatement of an employee denied first-hire rights, that employee's carryover seniority rights could conceivably disrupt a pre-existing seniority agreement between the new employer and a union, should one exist. Because the relationship is somewhat remote, the majority of circuit courts that have considered the question have decided against applying the NLRA's six-month limitation to litigants' first-hire cl ims under the EPP. See *Bowdry v. United Air Lines, Inc.*, 956 F.2d 999, 1004-07 (10th Cir. 1992) (rejecting NLRA time limit in favor of state-law period for suits on federal claims not otherwise specified); *Gonzales v. Aloha Airlines*, 940 F.2d 1312, 1314-15 (9th Cir. 1991) (same); *McDonald v. Piedmont Aviation, Inc.*, 930 F.2d 220, 224-25 (2d Cir. 1991) (rejecting NLRA period in favor of three-year state tort statute of limitations); but see *Haggerty v. USAir, Inc.*, 952 F.2d 781, 786-88 (3d Cir. 1992) (borrowing NLRA's six-month limitations period for EPP claims. We do the same.

Piedmont alternatively suggests that we treat Crocker's suit as an age discrimination case and apply the maximum 300-day time limit for filing such claims with the EEOC under the federal Age Discrimination in Employment Act ("ADEA"). It is true that the plaintiff here has suggested that his EPP rights were ignored because of his age, and it is also true that the text of the EPP explicitly gives protected employees rights of first hire "regardless of age." But age discrimination is in no way an essential component of an EPP suit; protected workers who meet a carrier's established hiring qualifications, see 29 CFR

§ 220.11(a), may have a cause of action if their first-hire rights are ignored for *any* reason, age simply being an explicitly listed example. See, e.g., *Bowdry,* 956 F.2d at 1001-04 (airline violated EPP by refusing to hire workers who had rejected alternative opportunity for employment by another carrier); *Long,* 913 F.2d at 1267-69 (airline violated EPP by denying first-hire rights to employees it had replaced in an economic strike). To make the choice of limitations period turn on the particular facts or theory of each claim would clearly "breed[] uncertainty and time-consuming litigation," *Wilson v. Garcia,* 471 U.S. at 272; we must therefore pick a single period fitted as well as possible to the EPP as a generic cause of action. The ADEA's limitations period does not qualify.

In short, we find no obvious federal statutory analog to the EPP cause of action and only a moderate federal policy interest in uniformity that would be frustrated by borrowing state law. We therefore look for an appropriate statute of limitations in the law of the District of Columbia. Piedmont, on substantially the same grounds it invoked for use of the ADEA, urges us to adopt the one-year limitations period for bringing claims under the D.C. Human Rights Act. See *D.C. Code* § 1-2544(a) (one-year limit for filing administrative claims with Office of Human Rights); *Davis v. Potomac Elec. Power Co.,* 449 A.2d 278 (D.C. 1982) (applying this one-year period to suits filed under the Act). That statute makes it unlawful to fail to hire an individual "wholly or partially for a discriminatory reason based upon [the person's] race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, or political affiliation." *D.C. Code* § 1-2512(a) and (a)(1). Though the D.C. Human Rights Act covers a broader range of employment discrimination claims than does the federal ADEA, it is not on that account more suitable. Again, the EPP is not a ban on discrimination but an explicit requirement

of preference on the basis of a single characteristic; proof of discrimination on any of the bases enumerated in the D.C. Human Rights Act is neither necessary nor sufficient for a successful EPP first-hire claim. A plaintiff may, as a matter of trial strategy, try to prove that discrimination motivated the defendant's refusal to recognize his or her first-hire rights in a particular case, but any resulting similarity between EPP litigation and antidiscrimination claims is fortuitous.

At oral argument, it was suggested that we apply the District of Columbia's one-year statute of limitations for "libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment," *D.C. Code* § 12-301(4), on the theory that a defendant's violation of its first-hire duties under the EPP constitutes an intentional tort similar to those in the statute. Cf. *Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1114-15, 1115 n.30 (D.C. Cir. 1985) (applying § 12-301(4)'s one-year period to *Bivens* action based on alleged defamation); *McClam v. Barry*, 697 F.2d 366, 372-74 (D.C. Cir. 1983) (applying § 12-301(4) to *Bivens* claim alleging false imprisonment). But the District of Columbia courts have made it clear that § 12-301(4)'s one-year limitations period governs only the specific enumerated torts; it does not apply generically to all intentional torts. See *Saunders v. Nemati*, 580 A.2d 660, 663-64 (D.C. 1990). Significantly for our case, § 12-301(4) does not cover intentional *economic* torts such as tortious interference with contract or fraud. See *id.* In *Banks v. Chesapeake & Potomac Tel. Co.*, 802 F.2d 1416, 1427 (D.C. Cir. 1986), we said in dictum that § 12-301(4) should not apply to a claim under 42 U.S.C. § 1981, as that section's guarantees of "equal rights to make and enforce contracts, equal access to judicial process, and equal rights under law" made it quite different from the physical and reputational torts covered by § 12-301(4), *id.* at 1428. The distinction is applicable here, and it seems compelling.

Having considered and rejected every other possibility proposed, we are left with the district court's choice: the local three-year period that governs all causes of action "for which a limitation is not otherwise specially prescribed," *D.C. Code* § 12-301(8). While it is easy to disparage this statute (as Piedmont does) as a mere catch-all or residual category, it does in fact embrace all personal injury claims in the District of Columbia (other than the few intentional physical and reputational torts covered by § 12-301(4), see *Banks*, 802 F.2d and 1426-27), including the economic torts of fraud and tortious interference, see *Saunders*, 580 A.2d at 663-64. Though its fit is not perfect, this statute appears closest to our generic cause of action. Cf. *DelCostello*, 462 U.S. at 171 (stating that selection of state law is the norm even where it fails to provide a "perfect analogy").

We therefore agree with the district court that the general three-year statute of limitations in § 12-301(8) governs this suit for violation of EPP first-hire rights. Because Crocker filed his complaint nine months before this period ran, his suit was timely. As a result, we must proceed to address Crocker's possible right to a jury trial.

III.

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Crocker's suit asked for instatement with Piedmont as a pilot and back pay from the date his claim accrued. Both parties agree that instatement is an equitable remedy, not a legal one; Crocker concedes that if he had sought only instatement, his suit could be tried without a jury. The question, then, is whether the Constitution requires a jury trial of Crocker's claim for back pay.

The Supreme Court has established a two-step inquiry for determining when a litigant has a right to have his or her claims under a statute heard by a jury:

> To determine whether a particular action will resolve legal rights, and therefore give rise to a jury trial right, we examine both the nature of the issues involved and the remedy sought. First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.

Wooddell v. International Bhd. of Elec. Workers, 112 S. Ct. 494, 497 (1991) (citations and internal quotation marks omitted). For reasons that will become apparent in the next section, the second part of this test (the nature of the remedy) is more important than the first. See *id.* at 498; *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). We take each part of this inquiry in turn.

A. *Analogies to 18th-Century English Practice*

Where the right at issue is a creature of recent statute, the search for an 18th-century English analog typically yields no clear answer. Given the radical difference between mid-20th-century American ideas of the proper role of the state and the ideas prevailing in 18th-century England, this difficulty is hardly surprising; it is certainly present here. Moreover, as the focus of the inquiry is on whether the "*issue* to be tried" was analogous to one characteristically dealt with in equity or at common law, *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 569 (1990) (emphasis in original), and as most traditional issues could be tried in both contexts (albeit leading to different remedies), inconclusive results seem foreordained.

Piedmont, recalling the efforts of William Marbury to secure his commission as justice of the peace, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), suggests that Crocker's suit for instatement is analogous to a request for a writ of mandamus, which it characterizes as equit-

able. Technically, this characterization is incorrect: writs of mandamus, like the other prerogative writs, were primarily issued by the King's Bench, a court of common law and not equity. See 1 William Holdsworth, *A History of English Law* 229 (6th ed. 1938); see also *Heine v. The Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 660 (1873) ("Mandamus is essentially and exclusively a common-law remedy and is unknown to the equity practice"). The point is probably immaterial, however, for an action in mandamus was never tried by a jury.

The more serious difficulty is that Crocker's claim is not closely analogous to a petition for a writ of mandamus. The King's Bench issued such writs as part of its exercise of the royal powers of administration; they were "directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, *which appertains to their office and duty*." 3 William Blackstone, *Commentaries* *110 (emphasis changed). But so far as appears, the writ served only for ordering *public* officials to perform clear ministerial duties, and officials of corporations were deemed public only by virtue of their organizations' royal charters. While a writ of mandamus might therefore lie "to compel the admission or restoration of the party applying to any office or franchise *of a public nature*, whether spiritual or temporal," *id.* (emphasis added), we can find no evidence of its application in the 18th century to purely private employment below the level of corporate official, the scenario relevant to Crocker's claim.

Crocker, on the other hand, suggests that Piedmont's alleged failure to hire him in disregard of the EPP's statutory command is analogous to the tort of wrongful discharge—or more precisely, to the public policy exceptions to the employment-at-will doctrine, which may prevent the firing of employees who exercise statutory rights (e.g., applying for workers' compensation) or fulfill statu-

tory duties (e.g., jury duty or reporting fraud). Whether or not this analogy is apt, it fails for our purposes because the tort of wrongful discharge is a creature of the twentieth century, not the eighteenth. The first significant statutory abridgement of the employment-at-will doctrine was the National Labor Relations Act, and cases recognizing a wrongful discharge tort grounded in public policy did not arise until the 1950s. See Timothy J. Heinsz, The Assault on the Employment at Will Doctrine: Management Considerations, 48 Mo. L. Rev. 855, 873-77 (1983); Brian F. Berger, Note, Defining Public Policy Torts in At-Will Dismissals, 34 Stan. L. Rev. 153, 155-58 (1981).

Crocker also highlights the age discrimination aspects of his claim and suggests analogies to traditional tort actions for personal injuries, noting that the Supreme Court has drawn similar analogies for certain discrimination claims. See, e.g., *Curtis v. Loether*, 415 U.S. 189, 195-96 n.10 (1974) ("An action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress."); see also *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987) (analogizing 42 U.S.C. § 1981 claims to personal injury claims for purposes of determining statute of limitations); *Wilson*, 471 U.S. at 277-78 (same for § 1983). But as we have now said twice, the age discrimination aspects of this case are legally peripheral, and an EPP first-hire action is not, at its core, an antidiscrimination suit.

In one final attempt to fit his case into a traditional tort-law paradigm, Crocker reframes it as follows: as in any other personal injury action, the law (here, the EPP) imposed a duty of care on Piedmont towards people in Crocker's situation, Piedmont breached that duty, the breach injured Crocker, and Crocker suffered damages. But while it is true that courts have long looked to statutes for the applicable standard of care in tort actions, see, e.g., 3 Fowler V. Harper et al., *The Law of Torts*

§ 17.6 (2d ed. 1986), Crocker's argument is at far too high a level of generality to control. It would allow *any* lawsuit alleging some violation of the law to be bootstrapped into a personal injury paradigm simply by reframing the alleged legal violation as a breach of a duty of care.

We are therefore left—to borrow the Supreme Court's term for the outcome of a similarly futile historical inquiry—"in equipoise." *Terry*, 494 U.S. at 570. Of course, the lack of a closely analogous cause of action does not automatically mean, as Piedmont suggests, that Crocker has no right to a jury trial, given that "the right extends beyond the common-law forms of action recognized" in 1791, *Curtis*, 415 U.S. at 193. Rather, we proceed to the second and more important step of the Seventh Amendment inquiry: the characterization of the remedies the plaintiff is seeking as either legal or equitable.

B. *The Nature of the EPP Backpay Remedy*

The Supreme Court has held that as a general rule awards of pecuniary relief such as back pay are legal. See *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2068 (1993); *Terry*, 494 U.S. at 570; *Curtis*, 415 U.S. at 196. This is not so in every case, however; courts of equity have long had the power to give pecuniary relief should specific performance or other traditionally equitable remedies be insufficient. See *Mertens*, 113 S. Ct. at 2068-69; see also Arthur G. Sedgwick & Joseph H. Beale, *A Treatise on the Measure of Damages* § 1256b (9th Ed. 1920). In *Teamsters v. Terry*, the Court articulated two exceptions to the general rule that back pay or other monetary relief is legal and entitles the plaintiff to a jury trial:

> First, we have characterized damages as equitable where they are restitutionary, such as in "action[s] for disgorgement of improper profits," *Tull* [*v. United States*], 481 U.S. [412,] 424 [(1987)]. See

> also *Curtis v. Loether, supra*, at 197; *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946). . . . Second, a monetary award "incidental to or intertwined with injunctive relief" may be equitable. *Tull, supra*, at 424. See, e.g., *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960). . . .

494 U.S. at 570-71. If the monetary relief requested possesses neither of these attributes, the remedy is considered legal, and the plaintiff is entitled to a jury trial on his or her complaint. *Id.* at 570.

The first element of this test turns on the definition of "restitutionary". "Restitution [is] defined as that body of law in which (1) substantive liability is based on unjust enrichment, (2) the measure of recovery is based on defendant's gain instead of plaintiff's loss, *or* (3) the court restores to plaintiff, in kind, his lost property or its proceeds." Douglas Laycock, The Scope and Significance of Restitution, 67 Tex. L. Rev. 1277, 1293 (1989) (emphasis in original). An action in restitution *can* result in the defendant's payment of money, either because that sum of money was itself the thing unjustly taken or because the thing taken has been converted and can no longer be specifically returned. See, e.g., *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946). In such a case the payment of money from defendant to plaintiff represents a kind of specific relief rather than compensatory damages.

Whatever restitution may encompass, however, we clearly may not collapse it into the broader notion of "compensation." Cf. Laycock, *supra*, at 1282-83. Yet it is hard to see how back pay could generally be characterized as restitutionary without having that effect. Two characteristics tend to make Crocker's requested back pay more like compensatory damages than specific relief. First, his recovery would not be measured by any hypothetical gain Piedmont had enjoyed, even if such a

gain were measurable, which it is not. Second, as we noted in *Hubbard v. Administrator, EPA*, 982 F.2d 531, 533-34 (D.C. Cir. 1992) (en banc), income from alternative employment is deducted from the gross unpaid income, precisely so that the plaintiff will be compensated solely for his actual losses. Crocker's claim for back pay is thus not restitutionary. Cf. *Waldrop v. Southern Co. Svcs., Inc.*, 24 F.3d 152, 158-59 (11th Cir. 1994) (back pay award under § 504 of Rehabilitation Act represents compensatory damages, not restitution).

The second prong of the *Terry* test holds that monetary damages "incidental to or intertwined with injunctive relief" may be considered equitable for Seventh Amendment purposes. Piedmont argues that Crocker's claims for back pay and instatement (a form of injunctive relief) are intertwined simply because they were brought together in the same complaint. *Terry* provides some support for the idea that the relevant "intertwining" is found in the plaintiff's request for remedies; in that case all the claims for injunctive relief had dropped out by the time of appeal, and the Court noted tersely that "[b]ecause respondents seek only money damages, this characteristic is clearly absent from the case." 494 U.S. at 571. But where all claims for legal and equitable relief are still live, the Court in fact seems not to look to the palintiff's demand for indicia of intertwining. The plaintiff in *Wooddell* sued his union under the LMRDA for discrimination in job referrals and requested both back pay and injunctive relief in a single complaint. The *Wooddell* Court required a jury trial on the backpay claims notwithstanding the fact that both types of claims were live at the time of the appeal. 112 S. Ct. at 498.

Nor do we think that the term can, as both parties suggest,[3] refer to the relative worth of the back pay and

[3] Crocker argues that his original demand for instatement is now moot because he is nearly 70 years old, while Piedmont insists that Crocker's prayer for instatement was the essence of his complaint, back pay being computed secondarily from the point of instatement.

equitable claims at a particular point in the litigation. The Court has repeatedly and firmly insisted that the right to jury trial on a legal claim cannot be extinguished simply because modern procedural devices have brought it together in the same suit as an equitable claim. See *Ross v. Bernhard*, 396 U.S. 531, 537-38 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). And *Dairy Queen*'s disparagement of the idea that the jury right could be "lost as to legal issues where those issues are characterized as 'incidental' to equitable issues," 369 U.S. at 470, would sit awkwardly with any such quantitative comparison. But cf. *Tull v. United States*, 481 U.S. 412, 424-25 (1987) (characterizing civil penalty as legal and noting that its amount, $22 million, "hardly [could] be considered incidental to the modest equitable relief sought in this case").

It appears instead that the status of a claim as "intertwined" or "incidental" with injunctive relief depends on the remedial structure of the statutory scheme. The Supreme Court has characterized lost-wage and backpay remedies as equitable when the power to award such amounts was derived from a statutory grant of equitable authority. In *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960)—the sole example of intertwining cited by *Terry*—the Court found that § 17 of the Fair Labor Standards Act, 29 U.S.C. § 217, which gave the district courts explicit power to enjoin certain retaliatory discharges, implicitly also gave them power to award whatever supplementary relief was necessary to further the purposes of the statute, including lost wages. The Court characterized this implied power as equitable, not because lost-wage relief inherently sounds in equity, but rather because it arose derivatively from the equitable injunction powers granted by the statute. *Id.* at 291-93.

Title VII, at least before its amendment by Civil Rights Act of 1991, is likewise a statutory scheme under which back pay is merely incidental to equitable relief.

See *Sparrow v. Commissioner*, 949 F.2d 434, 437-38 (D.C. Cir. 1991) (collecting cases). The text of Title VII itself subordinates the granting of back pay to an award of reinstatement, which in turn is merely a manifestation of the statute's grant of injunctive powers and derivative equity jurisdiction:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, *the court may enjoin* the respondent from engaging in such unlawful employment practice, *and order such affirmative action as may be appropriate*, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., *or any other equitable relief* as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1) (emphasis added). See *Terry*, 494 U.S. at 572 (citing this language to justify assumption that Title VII backpay claims are equitable and to distinguish those claims from rights of action implied from the NLRA); *Curtis*, 415 U.S. at 197 (1974) (contrasting this language with Title VIII's simple authorization of damages and holding that equitable nature of Title VII relief should not control characterization of Title VIII remedies). Further, the characterization of Title VII backpay awards as equitable is bolstered by the fact that judges formally retain some degree of equitable discretion in deciding whether to award back pay in individual cases once violations are proven, see *Lorillard v. Pons*, 434 U.S. 575, 584 (1978); *Curtis*, 415 U.S. at 197, even though the Court has severely constrained the exercise of this discretion, *see Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

On the other hand, where a statute does not explicitly describe money damages as equitable, or where the imposition of such damages is not a matter of equitable discretion once a defendant's violation is proven, the

Court has characterized the relief as legal and required a jury trial. See *Lorillard*, 434 U.S. at 584 (noting that the ADEA "incorporates the FLSA provision that employers 'shall be liable' [for wage deficiencies], while under Title VII, the availability of backpay is a matter of equitable discretion"; jury trial therefore available); *Curtis*, 415 U.S. at 197 (holding jury trial available for Title VIII money damages claim; "There is no comparable discretion here: if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount."). Similarly, where the power to award money damages is not merely derivative of the court's authority to enjoin statutory violations but rests on a "separate and distinct statutory provision," the award of damages will not be considered "incidental to or intertwined with" equitable relief. *Tull v. United States*, 481 U.S. at 425.

It may seem counterintuitive to determine the availability of a *constitutional* guarantee on the basis of such subtle intimations from *Congress*. But such an approach may be inevitable in a system of rules that attaches the jury right to novel causes of action created by Congress, see *Curtis*, 415 U.S. at 194, and yet allows Congress freely to extinguish these rights by assigning their adjudication to a non-judicial body, see, e.g., *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 450 (1977).

Here, of course, we have no statutory provision whatever creating the cause of action or identifying the available remedies. But the Supreme Court has made clear that even with respect to implied causes of action, courts are presumed to possess the full range of remedial powers —legal as well as equitable—unless Congress has expressly restricted their exercise. See *Franklin v. Gwinnett County Pub. Schools*, 112 S. Ct. 1028, 1035, 1038 (1992). Although *Franklin* does not address the issue of jury trial, the inference that Congress intended a full range of remedies for implied causes of action undercuts any assertion of statutory basis for viewing the court's

power to award back pay as merely "incidental to or intertwined with" its ability to grant equitable relief. Finally, we note that *Terry* itself found a jury right for a purely implied cause of action for back pay. 494 U.S. at 563.

Given that neither of *Terry*'s two exceptions applies, we hold that Crocker's prayer for back pay is a request for legal money damages and not equitable relief. Crocker was therefore entitled to a jury trial on his claim, and the district court was wrong to strike his jury demand. We now determine whether this error was harmless or whether a new trial is required.

C. *Was the Failure To Give a Jury Trial Prejudicial?*

Given the importance of the constitutional right to a jury trial, we will require a new trial when that right is erroneously withheld "except in the rare instances in which denial of a jury demonstrably was harmless error," 9 Wright, Miller & Cooper § 2322, at 175. Such error is harmless only when the party's case is so weak that if it *had* been tried before a jury, a directed verdict would have been appropriate—that is, when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party," Fed. R. Civ. P. 50(a)(1). See also *Partee v. Buch*, 28 F.3d 636, 639 (7th Cir. 1994); *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 827 (4th Cir. 1994). Here, the evidence on Piedmont's side does not meet that test.

As noted above, Crocker asserted that Piedmont declined to hire him because of his age, while Piedmont contended that it rejected him simply through application of a general policy against hiring pilots who had ever been suspended by the Federal Aviation Administration for 30 days or more, a policy that if regularly applied would be an adequate defense. See 29 CFR §§ 220.11(a), 220.21(a) (allowing carriers to set some employment

requirements and limiting first-hire rights to applicants who meet all legitimate qualifications). The district court accepted Piedmont's defense, finding that the airline had a "consistent practice" of refusing to hire applicants whose flying licenses had been suspended for 30 days or more. But the evidence of such a policy was hardly conclusive, consisting largely of the following colloquy with Captain Sharp, the official who had conducted Piedmont's initial interview of Crocker in July 1982:

> Q: Has Piedmont, in your recollection, in its history ever hired a pilot applicant who had his license suspended by the FAA for thirty days?
>
> A: Not to my knowledge.

Sharp testified that at the interview he had asked Crocker to explain his suspension, which Crocker had listed on his application for employment. Sharp said he was disturbed by both the substance of Crocker's violations of FAA safety rules and his defiant and cavalier attitude towards the suspension.

Crocker contradicted the suggestion that he was automatically disqualified from consideration. He and his wife testified that he had been encouraged after the interview to take an additional required flight engineers' exam and that he had repeated contact with Piedmont in the months following and received word each time that his application was still under consideration. He notes that despite his imperfect safety record, Sharp gave him the same numerical ratings during the interview as he did some other candidates who were hired. In addition, Crocker presented more than a mere "scintilla" of evidence suggesting that his age, and not his safety record, was responsible for his not being hired, *Harbor Ins. Co v. Schnabel*, 946 F.2d 930, 935 (D.C. Cir. 1991): he introduced a letter from the airline stating that it had a preference for pilot applicants between 24 and 32 years old, he elicited on cross-examination that Sharp had written down the ages of all

applicants during their interviews, and he demonstrated that at the time of his interview he was nine years older than the oldest hired candidate. Regardless of whether Crocker could have affirmatively proved a full age-discrimination claim on this evidence, we do think that he cast enough doubt on Piedmont's claimed reason for failing to hire him that a reasonable jury could have found in his favor. We therefore find that the district court's erroneous refusal of a jury trial was prejudicial error and that a retrial is required.

* * *

We find that Crocker was entitled to a jury trial on his claims, that the striking of his jury demand was prejudicial error, and that his suit was not time-barred. We therefore affirm the district court's 1988 ruling on the applicable statute of limitations, vacate the orders striking the demand for a jury trial and entering judgment for Piedmont after the bench trial, and remand the case to the district court for further proceedings.

So ordered.

[Filed Mar. 3, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-7141

HOBART N. CROCKER, JR.,
Appellant

v.

PIEDMONT AVIATION, INC.,
Appellee

93-7142

HOBART N. CROCKER, JR.,
Appellee

v.

PIEDMONT AVIATION, INC.,
Appellant

Before: Williams, Ginsburg and Rogers, *Circuit Judges.*

ORDER

It is ORDERED by the court that opinion filed by the court on March 3, 1995, be amended as follows:

Page 5, 10 lines from the bottom, delete "18 R. Miller" and insert in lieu thereof, "18 Charles A. Wright, Arthur R. Miller".

Per Curiam

FOR THE COURT

By: /s/ Eva Brown
Deputy Clerk

[Filed Mar. 3, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-7141

HOBART N. CROCKER, JR.,
Appellant,

v.

PIEDMONT AVIATION, INC.,
Appellee

and Consolidated Case No. 93-7142

Appeals from the United States District Court
for the District of Columbia

BEFORE: Williams, Ginsburg and Rogers, Circuit Judges

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in these causes is hereby affirmed in part, reversed in part, and the cases are remanded, all in accordance with the Opinion for the Court filed herein this date.

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Date: March 3, 1995

Opinion for the Court filed by Circuit Judge Williams.

[Filed May 4, 1993]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-1673 (RCL)

HOBART N. CROCKER, JR.,
Plaintiff,

v.

PIEDMONT AVIATION, INC.,
Defendant.

MEMORANDUM OPINION

This case comes before the court on defendant Piedmont Aviation Inc.'s memorandum concerning the availability to plaintiff of a jury trial and injunctive relief. Piedmont contends that neither injunctive relief nor a jury trial is available to plaintiff. Plaintiff contends the opposite. The briefing of these two issues is complete. The court concludes that injunctive relief is available to plaintiff but that a jury trial is not.

I. *FACTS.*

Plaintiff, Hobart N. Crocker, Jr., is a commercial airline pilot who lost his job with Air New England in October 1981 when that airline ceased operating. On or about July 1, 1982, Crocker applied to defendant, Piedmont, for employment as a pilot, Crocker's occupational specialty. Piedmont denied him employment, and Crocker contends that Piedmont's actions violated the Airline Deregulation Act of 1978, 49 U.S.C. § 1552 ("the Act").

As its name indicates, the Act initiated the deregulation of the airline industry. In order to soften the blow that deregulation could have on airline industry workers, the Act contained an employee protection provision. That provision, section 1552, required covered air carriers, like Piedmont, to give the first right of hire to protected employees, like Crocker, who were involuntarily placed on furlough or terminated by a covered air carrier due to either bankruptcy of the air carrier or a major contraction in the air carrier's work force. 49 U.S.C. § 1552(d)(1).

Crocker contends that Piedmont violated section 1552 by hiring non-protected employees before and instead of him. Crocker brings his claim under section 1522 and requests injunctive relief; in the form of a court order directing Piedmont to hire plaintiff as a pilot with rank, duties, seniority, and compensation commensurate with his skill, and seniority back dated to the date of his application; as well as back pay. Complaint at 4. Plaintiff also requests a trial by jury. *Id.*

At the direction of this court's 8/11/89 Memorandum Opinion and Order, defendant filed a memorandum which addresses the availability of both injunctive relief and a trial by jury under section 1522. Defendant contends neither is available, and the court construes defendant's memorandum as a motion to strike plaintiff's request for injunctive relief and jury demand. Plaintiff has responded and these issues are ripe for resolution. The court concludes that injunctive relief is available under section 1522 but that a trial by jury is not available because of the relief plaintiff has requested.

II. *ANALYSIS.*

Section 1552 does not expressly provide for a private cause of action should an air carrier fail to provide protected employees with the first right of hire. This court already has concluded that a cause of action can be implied in those circumstances. *Crocker v. Piedmont Avia-*

tion, 696 F.Supp. 685, 688 (D.D.C. 1988). The court now must determine the remedies available to the protected employee, a decision that will in turn decide whether a jury is the appropriate fact finder.

Given section 1552's silence as to private enforcement actions, it is no surprise that section 1552 also is silent as to the remedial relief available to successful litigants. Piedmont contends that neither injunctive relief nor a jury trial is available to plaintiff. The court addresses each issue in turn.

A. *The Availability of Injunctive Relief Under Section 1552.*

The Supreme Court has held that "all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies." *Franklin v. Gwinnett County Public Schools*, —— U.S. ——, 112 S.Ct. 1028, 1034 (1992). This has been so even when the cause of action at issue is implied. *Id.* at 1032, 1035.

This court accordingly concludes that injunctive relief is a remedy available under section 1552. The power of this court to enforce the Act implies the power to make effective the right of recovery afforded by the Act. " 'And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.' " *J.I. Case Co. v. Borak*, 377 U.S. 426, 433-34 (court not limited to remedy of declaratory judgment in its enforcement of Securities and Exchange Act of 1934), *quoting Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940).

Piedmont opposes this position on a number of grounds but each lacks merit. First, Piedmont contends that when Congress has desired that injunctive relief be available in a federal statutory action, Congress explicitly has so pro-

vided. Piedmont cites Title VII and the ADEA as examples of this practice. Because Congress has not specified that this form of relief is available under the Act, argues Piedmont, this court cannot resort to injunctive relief. This theory would be helpful here if the action at issue was one expressly allowed by statute, but it is not. Congress' failure to expressly provide for injunctive remedies under the Act means nothing here because Congress failed to even provide for the underlying cause of action. *See Franklin*, 112 S.Ct. at 1035.

Because Congress was silent as to the remedies available under the Act, the court can determine if Congress intended to limit application of the traditional presumption in favor of all appropriate relief only by evaluating the state of the law when the legislature passed the Act. *Id.* at 1035; *see Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378 (1982). When Congress passed the Act in 1978, the Supreme Court followed the presumption that the denial of a remedy was the exception rather than the rule. *See Franklin*, 112 S.Ct. at 1036 (presumption has been state of law since the early nineteenth century). Given this fact and Congress' complete silence on all aspects of this issue, the court must conclude that injunctive relief is an available remedy in Act failure-to-hire actions. *Cf. Franklin*, 112 S. Ct. at 1036 (presumption in favor of all remedies being available applies to implied right of action under Title IX).

Piedmont next argues that injunctive relief is inappropriate here because Crocker obtained and ultimately left alternative employment while his application was pending with Piedmont. Piedmont claims that the court should not be able to force Piedmont's employment of Crocker now that Crocker has held several other pilot positions with smaller airlines. This argument would have merit if Crocker had not been under a statutory duty to mitigate his unemployment time while his application with Piedmont was pending. The Act obligated protected em-

ployees to accept reasonably comparable employment when offered and penalized protected employees if they did not do so. 49 U.S.C. § 1552(b)(2). The fact that Crocker sought interim employment while waiting to hear from Piedmont demonstrates only that he mitigated the damages he can now seek from Piedmont. Crocker's actions at the time did not excuse Piedmont from its statutory duty then, and they do not now remove the availability of injunctive relief. *See Crocker v. Piedmont Aviation*, 933 F.2d 1024, 1026-27 (D.C. Cir. 1991).

Piedmont also argues that injunctive relief is no longer appropriate in failure-to-hire actions because Piedmont and every airline's duty to hire protected employees expired in 1988. Congress limited the duration of section 1552 to ten years, the period between 1978 and 1988. 49 U.S.C. § 1552(d)(1). Piedmont's obligation to give the right of first hire to protected employees, therefore, did end in 1988. Here, however, the alleged wrong occurred in 1984; *Crocker*, 696 F.Supp. at 693; a date during the ten year time period. The passage of the sunset date has not retroactively eliminated Piedmont's duty toward Crocker or changed the availability of injunctive relief as a remedy.

Piedmont's last argument against the availability of injunctive relief goes to the appropriateness of injunctive relief in this case. Piedmont's basic argument is that Crocker is not qualified to be a Piedmont pilot so Piedmont should not be ordered to hire him. This argument does not demonstrate the unavailability of injunctive relief as a remedy. It only addresses the appropriateness of such relief in this case. The court cannot address this argument until trial, when it has the full range of factual evidence before it.

Because Congress did not address the remedies available under the Act, the court must apply the long standing presumption that all remedies are available to Crocker in this action. The court concludes that it at least has

the option of issuing injunctive relief in this case. Accordingly, Piedmont's motion to strike Crocker's request for injunctive relief is denied. The court will wait until trial to decide whether injunctive relief is appropriate.

B. *The Availability Of A Jury Trial On The Backpay Issue.*

Because the Act does not expressly provide for a cause of action, it necessarily does not provide for the availability of a jury trial on the cause of action this court implicitly has found to exist. The court then must determine whether the Constitution confers a right to a jury trial for plaintiff on his claim under the Act. *See Tull v. United States*, 481 U.S. 412, 417 & n.3 (1987).

The right to a jury trial arises under the Seventh Amendment of the Constitution, which states that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const., amend. VII. Because Crocker's action is statutory and has no common law analogue, he is entitled to a jury trial only if his suit is one in which "*legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered . . . ." *Curtis v. Loether*, 415 U.S. 189, 193 (1974); *quoting Parsons v. Bedford*, 3 Pet. 433, 446-47 (1830).

Here Crocker requests two forms of relief: an order directing Piedmont to hire him and an order directing Piedmont to compensate him with backpay. The former request clearly involves an equitable issue in need of equitable relief and is not jury triable. That much Crocker admits. In dispute is the legal or equitable nature of Cocker's request for backpay.

Crocker contends that his request for backpay and benefits constitutes a request for "damages" and that actions for damages are actions at law. Crocker may style

the relief he requests as "damages" but that label does not change the inherently equitable nature of the remedy of backpay.

The Supreme Court has stated that the remedy of backpay is equitable in nature. *Franklin*, 112 S.Ct. at 1038. Congress also has denominated backpay to be an equitable remedy. 42 U.S.C. § 2000e-5(g)(1). The fact that backpay is monetary in form does not transform this remedy into the legal one of damages. *Curtis*, 415 U.S. at 196. Plaintiff cites many cases for the general proposition that monetary remedies are legal remedies controlled by a jury, *see* Plaintiff's Memorandum at 5, but those cases fail to address the uniquely equitable nature of backpay.

Backpay and money damages both may be monetary in form but that is their singular similarity. Backpay and money damages are distinguishable because of the different purpose each serves. Backpay seeks to redress purely economic harm and give back to a party what he claims rightly belongs to him. Money damages redress injuries and instead seek to compensate a party for some wrong the party suffered. That is why money damages tend to be the remedy of choice in tort actions. *See Curtis*, 415 U.S. at 195.

These distinctions prevent backpay's monetary form from transforming it into a legal remedy. Because Crocker's request for injunctive relief and backpay constitutes a request for equitable relief only, Crocker is not entitled to a jury trial of his claims. Piedmont's motion to strike Crocker's jury demand is granted.

III. *CONCLUSION*.

For the reasons stated, the court concludes that it is within its power to grant injunctive relief in this case because Congress was silent as to the remedies available to plaintiffs in Airline Deregulation Act claims. The court concludes that no right to a jury trial exists here,

however, because Crocker has requested only equitable relief on his claim. An Order to this effect shall issue this date.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

Date: May 4, 1993

[Filed May 4, 1993]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-1673 (RCL)

HOBART N. CROCKER, JR.,
Plaintiff,

v.

PIEDMONT AVIATION, INC.,
Defendant.

ORDER

This case comes before the court on defendant Piedmont Aviation Inc.'s memorandum concerning the availability to plaintiff of a jury trial and injunctive relief. The court treats Piedmont's memorandum as a motion to strike plaintiff's request for injunctive relief and jury demand. Plaintiff has responded and the issue is ripe for resolution.

For the reasons stated in the Memorandum Opinion issued this date, it is hereby ORDERED that:

1. Defendant's Motion to Strike plaintiffs' request for injunctive relief is DENIED. Injunctive relief is available in plaintiff's cause of action and evidence on that issue is admissible at trial.

2. Defendant's Motion to Strike plaintiff's jury demand is GRANTED. Plaintiff has no right to a jury trial because he has requested only equitable relief.

3. Trial is re-scheduled to commence as a bench trial at 10:00 a.m. on May 17, 1993.

SO ORDERED.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

Date: May 4, 1993

[Filed Jul. 22, 1993]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-1673 (RCL)

HOBART N. CROCKER, JR.,
Plaintiff,

v.

PIEDMONT AVIATION, INC.,
Defendant.

MEMORANDUM OPINION

This case came before the court for trial on May 17 and 18, 1993. Both parties then submitted proposed findings of fact and conclusions of law, after which the court heard their closing arguments. Based upon the testimony submitted at trial, the trial exhibits, the parties' submissions, and closing arguments, the court concludes that it must rule for the defendant.

This case arises under the Airline Deregulation Act of 1978. That Act initiated the deregulation of the airline industry. To assist airline employees who might be dislocated as a result of airline deregulation, Congress included an employee protection provision in the Act. That provision provides that:

> Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or otherwise terminated by such an air carrier (other than for

> cause) prior to the last day of the 10-year period beginning on October 24, 1978 shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate issued under section 1371 of this title prior to October 24, 1978. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person. Any employee who is furloughed or otherwise terminated (other than for cause), and who is hired by another air carrier under the provisions of this subsection, shall retain his rights of seniority and right of recall with the air carrier that furloughed or terminated him.

49 U.S.C. § 1552(d)(1). Pursuant to the Act, the Department of Labor promulgated regulations that permitted covered carriers to apply their own non-age-based qualification standards and prerequisites when considering whether to hire a protected employee. 29 C.F.R. §§ 220.11(a), 220.20(a), 220.21 (1989).

Plaintiff, Hobart N. Crocker, brings his claim under the Act, and asserts that Piedmont denied him his statutory first right of hire when Piedmont began hiring non-protected employees in March, 1984. Piedmont defends its actions by contending that Crocker lacked the qualifications necessary to receive an offer of employment. Specifically, Piedmont contends that Crocker's previous FAA violation disqualified him from Piedmont's consideration. As the court's Findings of Fact and Conclusions of Law make clear, the court concludes that Piedmont did not violate Crocker's statutory right because Crocker's FAA violation disqualified him from employment with Piedmont.

I. *FINDINGS OF FACT.*

1. Crocker was employed as a pilot by Air New England, Inc. ("ANE") from June 18, 1973 until ANE's termination of operations at the end of October 1981. Tr. 5/17/93 at 15. Beginning in February of 1982, Crocker sent letters with resumes to approximately 70 airlines and requested application forms from them. *Id.* at 16-18; Pl. Exh. 26. On April 6, 1982, Crocker sent such a letter to Piedmont. Tr. 5/17/93 at 18; Pl. Exh. 3. At that time, Crocker was 56 years old. Tr. 5/17/93 at 18.

2. Piedmont responded to Crocker's letter by sending him a cover letter, a blank application form, and a single page document which described the minimal qualifications for Piedmont pilot applicants. Tr. 5/18/93 at 138-40; Pl. Exh. 3; Def. Exh. J. Crocker completed the blank Piedmont pilot application form on July 1, 1982, only after he received a telephone call from Ray Welch, Piedmont's Director of Personnel Administration, in which Welch invited Crocker to an interview at Piedmont on July 6, 1982, Tr. 5/17/93 at 51, 80. Crocker submitted his completed application form to Piedmont when Ray Welch and Captain Gene Sharp, Piedmont's Vice President of Flight Operations, interviewed Crocker at Piedmont's headquarters in Winston-Salem, North Carolina, on July 6, 1982. *Id.* at 20; Tr. 5/18/93 at 82; Stipulated Fact No. 3.

3. On October 25, 1978, the New England Regional Counsel for the Federal Aviation Administration ("FAA") charged Hobart Crocker with violating FAA regulations on April 15, 1978 while acting as pilot-in-command of an ANE DHC-6 aircraft flying between Boston, Massachusetts, and Lebanon, New Hampshire. Def. Exh. I at 2636-37. The FAA alleged that after detecting a fuel leak in the aircraft cabin, Crocker flew the aircraft to its scheduled destination, rather than diverting to the nearest available airport. *Id.* at 2637. The FAA imposed a 60 day license suspension for the violation. *Id.* at 2643.

4. Crocker appealed the FAA violation to an independent administrative law judge of the National Transportation Board. *Id.* An attorney from the Airline Pilots Association represented Crocker at the appeal hearing and Crocker was permitted to submit evidence concerning his version of the incident. Tr. 5/17/93 at 68-69. After the hearing, the administrative law judge concluded that the fuel leak had made "the aircraft unairworthy, "the pilot's judgment [had been] improper" in not stopping at an airport closer than Lebanon, and that Crocker had engaged in the "careless" operation of the aircraft in violation of FAA regulations. Def. Exh. I at 2643-2645. The administrative law judge nevertheless reduced Crocker's suspension to 30 days. *Id.*

5. During Crocker's July 6th interview, Capt. Sharp questioned Crocker about his FAA violation. Tr. 5/18/93 at 85-86, 94-95. Capt. Sharp questioned Crocker about the FAA violation because Crocker had listed it on his Piedmont application. Pl. Exh. 4 at 320. Capt. Sharp's interviewing practice was to have any interviewee with an FAA violation explain that violation so that Sharp and the other interviewers could make a judgment call as to whether the violation was a valid one. Tr. 5/18/93 at 95. Despite this practice, Capt. Sharp could recollect no instance in which Piedmont had ever hired a pilot who the FAA had sanctioned with a 30 day license suspension. *Id.*

6. After discussing the violation with Crocker, Capt. Sharp was concerned with the substance of Crocker's FAA violation as well as Crocker's attitude regarding it. *Id.* at 86. Capt. Sharp considered the fuel leak to be a serious problem and he did not think that he would have continued on to Lebanon as Crocker had. *Id.* More importantly, Capt. Sharp did not appreciate Crocker's casual disregard for the severity of the violation. *Id.*

7. There are various levels of FAA violations, including a warning letter, license suspension, and license revo-

cation. *Id.* at 95. The FAA rarely suspends a pilot's license, as it did with Crocker, and has imposed this penalty on less than one percent of all pilots. *Id.* at 95-96. Crocker's attitude regarding his license suspension ignored the severity of this penalty.

8. Crocker has maintained since 1978 that his FAA violation was unwarranted, politically motivated, and that he was correct in deciding to continue on the flight and not land at the nearest available airport. Tr. 5/17/93 at 71, 102-105. In his December 1982 application for employment with Coral Air, Crocker described his view of the FAA violation as follows:

> Failure to land at nearest suitable airfield in point of time with fuel leak. Lost court case that had political implications with Director of Publicity of Dartmouth U. and Senator McIntyre of New Hampshire. I in fact had landed at the nearest suitable airport (LEB) but had difficulty proving it. Although the leak was not a critical hazard the FAA claimed that I should have landed at an obscure unattended grass landing strip. I would still do it my way. HNC.

Def. Exh. XX; Tr. 5/17/93 at 71-73. Crocker has felt this way since he first incurred the violation. Tr. 5/17/93 at 71-73. The court finds that Crocker communicated this same attitude during his July 6, 1983 interview with Capt. Sharp and Ray Welch.

II. *CONCLUSIONS OF LAW.*

1. In order to prevail on his claim under the Airline Deregulation Act, Crocker must prove:

a) That he is a "protected employee" under section 43;

b) That he applied for employment with a covered carrier (Piedmont) when the carrier was hiring

additional employees for positions in that occupational specialty from outside its workforce;

c) That he complied with the carrier's normal application procedures;

d) That he expressly provided the carrier with notice of his protected status under Section 43(d);

e) That he fulfilled all of the carrier's qualifications and requirements for employment in that occupational specialty; and

f) That he was not hired for a position and that the carrier instead hired non-protected applicants from outside its workforce.

49 U.S.C. § 1552; 29 C.F.R. §§ 220.11(a), 220.20(a), 220.21(a) (1987); *Crocker v. Piedmont Aviation, Inc.*, 743 F. Supp. 1, 2-3 (D.D.C. 1989); *Crocker v. Piedmont Aviation, Inc.*, 696 F. Supp. 685, 693 (D.D.C. 1988); *Robinson v. American Airlines*, 722 F. Supp. 757 (D.D.C. 1989), *aff'd* 908 F.2d 1020 (D.C. Cir. 1990).

2. Crocker's claim does satisfy the first two of these requirements. Plaintiff Hobart Crocker, Jr. was employed as an air line pilot by Air New England between July 1973 and October 1981, and was a protected employee within the meaning of Section 43(d) of the Airline Deregulation Act. *Crocker v. Piedmont Aviation, Inc.*, 743 F. Supp. 1, 3 (D.D.C. 1989); *Crocker v. Piedmont Aviation, Inc.*, 685 F. Supp. 685 (D.D.C. 1988). Defendant Piedmont Aviation, Inc. was a covered air carrier which held a certificate pursuant to Section 1371 prior to October 24, 1978, and thus was subject to the provisions of Section 43(d) of the Airline Deregulation Act. 49 U.S.C. § 1552(d)(1); *Crocker v. Piedmont Aviation, Inc.*, 741 F. Supp. 241, 242 (D.D.C. 1989), *rev'd on other grounds*, 933 F.2d 1024 (D.C. Cir. 1990).

3. The court concludes that Crocker's claim fails despite Crocker's protected and Piedmont's covered status, because Crocker was not qualified for a job with Piedmont. *Robinson*, 908 F.2d at 1023. The implementing regulations for the Airline Deregulation Act make clear that "each designated employee must satisfy all qualifications or other requirements [other than initial hiring age] established by the hiring carrier" before they can claim their first right of hire. 29 C.F.R. §§ 220.11(a), 220.21(a). An airline can successfully defend itself against a claim under the Act if it can show that it refused to hire a protected employee based on his failure to satisfy the airline's non-age-based requirements. Piedmont has done so here.

4. Piedmont has presented sufficient evidence to prove that it enforced a bona fide hiring standard when it rejected Crocker. That standard was Piedmont's consistent practice of refusing to hire any pilot applicant who had received a 30 day license suspension from the FAA. The safety concerns that justify this sort of standard are obvious. Piedmont presented evidence, in the form of uncontested testimony from Capt. Sharp, that the FAA sanctions fewer that one percent of all pilots with this severe of a penalty, that consequently this type of reprimand is severe and must be taken seriously, and that Piedmont could in good faith question the safety standards of any pilot applicant with this type of violation on his record. Piedmont also presented evidence, again in the uncontested testimony of Capt. Sharp, that it had never hired a pilot applicant with this type of FAA violation in his or her record. In view of an airline's substantial obligation to operate with "the highest possible degree" of care, *see* 49 U.S.C. 1421(b), Piedmont's prohibition on hiring pilot applicants with such violations is justifiable and constitutes a bona fide non-age-based hiring standard. *Cf. Robinson*, 908 F.2d at 1023 (airline safety concerns can justify refusal to hire pilot applicant whose weight and blood pressure are within FAA

standards but above more stringent standards enforced by hiring airline). Given this evidence, the court concludes that Crocker's FAA violation extinguished his claim to a first right of hire from Piedmont.

5. Piedmont's legitimate safety concerns regarding Crocker's FAA violation were compounded in this case because of the circumstances surrounding that violation. Those circumstances include: (a) the involvement of an in-flight fuel leak and Crocker's apparent poor judgment, and (b) Crocker's consistent position that the violation was politically motivated and that he was not at fault; and (c) Crocker's representations to Piedmont, his potential employer, that this FAA violation was insignificant despite its rarity. The court concludes that as a potential employer Piedmont justifiably could be troubled not only by the existence of a safety violation in Crocker's record but also by Crocker's attitude and treatment of that violation. Even if the FAA violation alone was insufficient to disqualify Crocker, Crocker's attitude toward his violation also could have disqualified him from employment with Piedmont. Piedmont legitimately could deny employment to a pilot applicant who had such a casual attitude about such a severe violation.

6. The court notes that Crocker failed to rebut any of Piedmont's evidence on this issue. Plaintiff submitted no proposed findings or conclusions regarding Crocker's FAA violation. Plaintiff's counsel also failed to cross-examine Capt. Sharp regarding the significance Sharp attached to Crocker's FAA violation. For example, Capt. Sharp testified that he always allowed pilot applicants to explain the circumstances surrounding the FAA violation, but plaintiff's counsel made no attempt to question Capt. Sharp as to why this was his practice. Plaintiff's counsel also failed to question Capt. Sharp about the significance he attached to the FAA violation and Crocker's attitude regarding it. Plaintiff, in short, made no attempt to contain the significance of this blotch on his record and on his chances of getting hired by Piedmont.

7. Because Piedmont demonstrated that it declined to hire Crocker because he did not meet Piedmont's pilot standards, Crocker has the burden of proving, by a preponderance of the evidence, that Piedmont's reason for refusing to hire him was a pretext for not affording him rights as a protected employee or for discriminating against him based upon his age. *Robinson,* 722 F. Supp. at 763.

8. Plaintiff did offer some evidence that Piedmont denied Crocker his first right of hire because of Crocker's age and not because of his failure to satisfy any non-age-based standards. The court does find the age issue troubling, but as the court already has noted, plaintiff made no effort to undermine the significance of the FAA violation specifically with this evidence. Crocker made no attempt to prove that Piedmont refused to hire him because of his age rather than his FAA violation.

9. Even if Crocker had made an age pretext argument regarding his FAA violation, the court would not grant such a contention any consideration. Crocker's FAA violation was not some makeweight that Piedmont relied upon to justify its refusal to hire him. Crocker's FAA violation represented an objectively determinable disqualifying factor in Crocker's record. Piedmont never had to consider Crocker's age and contrive some pretext for depriving Crocker of a job based on his advanced years. That would only have been necessary if Piedmont had no better reason for denying Crocker employment. That was not the case here. Crocker's FAA violation and his attitude toward it provided Piedmont with a solid, independent, and justifiable basis for denying Crocker his first right of hire. Given Capt. Sharp's uncontested testimony that Piedmont has never hired a pilot applicant who has received this sort of violation, the court finds that Piedmont was statutorily justified in declining to offer Crocker employment on that basis despite his status as a protected employee.

III. *CONCLUSION.*

Under the Airline Deregulation Act, Hobart N. Crocker, Jr. was a protected employee entitled to a first right of hire from Piedmont Airlines when Crocker applied for a pilot's position with Piedmont in 1982. That statute's implementing regulations conditioned that right upon Crocker's satisfaction of Piedmont's bona fide non-age-based employment requirements. One of those Piedmont requirements was that a pilot applicant have no significant FAA violations in his record. Crocker's FAA violation and corresponding 30 day license suspension prevented his satisfaction of that requirement and extinguished his claim to a first right of hire. Accordingly, the court concludes that judgment shall be entered in favor of the defendant Piedmont Airlines. An appropriate Order shall issue this date.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

Date: Jul. 21, 1993

[Filed Jul. 22, 1993]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-1673 (RCL)

HOBART N. CROCKER, JR.,
Plaintiff,

v.

PIEDMONT AVIATION, INC.,
Defendant.

ORDER

This case came before the court for trial on May 17 and 18, 1993. Both parties then submitted proposed findings of fact and conclusions of law, after which the court heard their closing arguments. Based upon the testimony submitted at trial, the trial exhibits, the parties' submissions, and closing arguments, it is hereby ORDERED that:

Judgment shall be entered in favor of the defendant.

SO ORDERED.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

Date: Jul. 21, 1993

[Filed Apr. 19, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-7141

HOBART N. CROCKER, JR.,
Appellant,

v.

PIEDMONT AVIATION, INC.,
Appellee

and Consolidated Case No. 93-7142

BEFORE: Williams, Ginsburg and Rogers, Circuit Judges

ORDER

Upon consideration of appellee's Petition for Rehearing, filed March 31, 1995, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

[Filed Apr. 19, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-7141

HOBART N. CROCKER, JR.,
Appellant,

v.

PIEDMONT AVIATION, INC.,
Appellee

and Consolidated Case No. 93-7142

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Circuit Judges

ORDER

Appellee's Suggestion For Rehearing *In Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *in banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk